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SUPREME COURT OF THE UNITED STATES

Paul Kern Imbler,

Petitioner,

v.

Richard Pachtman,

District Attorney,

Respondent

No. 74-5435

October Term 1974

(District Attorney Immunity under 42 U.S.C. 1983 lawsuits with conflict in the Circuits)

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

Paul Kern Imbler,
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No. _____

October Term 1974

(District Attorney Perjury and Alleged Immunity under 42 U.S.C. 1983 lawsuit, with conflict in the Circuits)

To the Honorable Warren E. Burger, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Comes now Paul Kern Imbler, by his attorney Roger S. Hanson, a member of the Bar of this Honorable Court, and petitions for a Writ of Certiorari to review that certain 2-1 decision of the United States Court of Appeals for the Ninth Circuit entered July 12, 1974 affirming a decision of the United States District Court for the Central District of California, dismissing petitioner-plaintiff's suit brought under 42 U.S.C. 1983, the Federal Civil Rights Act, against the defendant Richard Pachtman, a Los Angeles County District Attorney.

A petition for rehearing and a suggestion for hearing En Banc was made and was rejected September 10, 1974, by the United States Court of Appeals for the Ninth Circuit, the Honorable John F. Kilkenny, Senior United States Circuit Judge voting for a rehearing and for a suggested hearing en banc. A copy of the order denying a rehearing, et al. entered September 10, 1974 is herewith attached to this

petition for certiorari.

Jurisdictional Statement

The grounds upon which the jurisdiction of this Court is invoked are 28 U.S.C. Section 1254(1). The other grounds upon which the jurisdiction of this case is invoked are a severe and clear-cut conflict of decisions in the various circuit courts of appeals in the United States. A further ground upon which the jurisdiction of this Honorable Court is invoked is a denial of equal protection of the law and deprivation of rights to bring a lawsuit under 42 U.S.C. 1983 in the courts governed by the United States Ninth Circuit, whereas had petitioner been able to bring his lawsuit in the Fourth, Fifth, Sixth, Seventh, or Eighth Circuit, his cause of action would not have been dismissed under the allegations of the complaint. The jurisdiction is further invoked under this Court's power to resolve critical issues of national importance.

Opinion Below

The opinion below is as yet unpublished, but a copy of it is herewith attached. The federal opinion granting petitioner Paul Kern Imbler's Writ of Habeas Corpus under 28 U.S.C. 2254 entitled Imbler v. Craven, 298 F. Supp. 795 (C.D. Calif. 1969), upon which the 42 U.S.C. 1983 lawsuit was based, is herewith attached, containing the findings of fact and conclusions of law. The said opinion, 298 F. Supp. 795 (C.D. Calif. 1969) granted petitioner Paul Kern Imbler a Federal Writ of Habeas Corpus because of, inter alia, the knowing use of perjured testimony on the part of the defendant District Attorney Richard Pachtman, said perjured testimony contributing to the conviction of Paul Kern Imbler for first

degree murder, and said perjured testimony causing him to be sentenced to death by lethal gas in the California gas chamber in the State Penitentiary at San Quentin.

Petitioner Imbler seeks certiorari under 28 U.S.C. 1254(1).

The district court opinion dismissing petitioner's suit against District Attorney Richard Pachtman is unpublished, and is herewith attached as part of this petition for writ of certiorari.

Reasons for Granting Certiorari and Issues to be Resolved

(1) To resolve and define on a national level the recurring issue and problem of the liability of a District Attorney to a lawsuit brought against him under the Federal Civil Rights Act, 42 U.S.C. 1983, and related statutes, an issue never fully considered and adjudicated by this Honorable Court.

(2) To resolve whether the knowing use of perjured testimony by a Deputy District Attorney to obtain a conviction for first degree murder and sentence of death is an act for which that Deputy District Attorney shall receive carte blanche immunity under 42 U.S.C. 1983, disenabling his victim from bringing a Federal Civil Rights Lawsuit for money damages.

(3) To resolve the conflict which now exists in the United States Court of Appeals for several of the federal circuits which have considered the above issue and which have rendered conflicting opinions, within the meaning of Rule 19 , Rules of the Supreme Court of the United States.

(4) To decide whether when, as here, a Federal Writ of Habeas Corpus has already been granted in the instant case for the knowing use of perjured testimony on the part of a Los Angeles County Deputy District Attorney by a United States

District Judge, and affirmed by the Ninth Circuit, it is appropriate to dismiss before trial, on the filed pleadings petitioner's lawsuit against the Deputy District Attorney brought under 42 U.S.C. 1983 and related statutes.

(5) To decide whether a Deputy District Attorney, an arm of the executive branch of state and county government, shall any longer be accorded any immunity under 42 U.S.C. 1983 following the decision of this Honorable Court in Scheuer v. Rhodes, ___ U.S. ___ , ___ S.Ct. ___ , ___ L.Ed.2d ___ , 42 U.S.L.W. 4543, April 17, 1974.

(6) To decide whether the knowing use of perjured testimony by a Deputy District Attorney to achieve a conviction for murder in the first degree with a resulting death sentence is an act within the normal prosecutorial function or role of a prosecuting attorney such as to insulate the said district attorney from a Federal Civil Rights lawsuit brought under 42 U.S.C. 1983 and related sections.

(7) To determine whether petitioner Paul Kern Imbler is receiving equal protection of the law in the Federal Ninth Circuit when his suit against a Deputy District Attorney under 42 U.S.C. 1983 is dismissed, whereas had the Deputy District Attorney carried out his dastardly act of knowingly using perjury in another Federal Circuit the said act would provide a basis for a cause of action, citing in particular the Sixth Circuit decision Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972) allowing said lawsuit; said 6th Circuit decision, Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972) is herewith appended for the convenience of this Honorable Court in support of the assertion that a severe conflict now exists in the Federal Circuits.

(8) Whether, if the asserted "immunity" enjoyed by a District Attorney stems from an alleged "quasi-judicial"

position occupied by a District Attorney, a judge should be given immunity in any case where he knowingly suffers or allows perjured testimony to occur in his courtroom in any criminal proceeding; whether if such a judge who knowingly suffers or allows perjury to occur in his court when offered by the prosecution should not receive immunity, whether then a District Attorney should be granted "quasi-judicial" immunity.

(9) Whether a violation of federal civil rights, a cause of action against a Deputy District Attorney under 42 U.S.C. 1983 should be allowed to stand, at least under the limited circumstances present in the case at bar, where:

a. the District Attorney has already been found by a United States District Judge to have knowingly used perjured testimony to convict the petitioner Paul Kern Imbler, 298 F. Supp. 795 (C.D. Calif. 1969);

b. this finding was made during procedures leading to the grant of a petition for writ of habeas corpus under 28 U.S.C. 2254 for, inter alia, the knowing use of perjured testimony to convict the petitioner Paul Kern Imbler, on the part of the defendant herein, Deputy District Attorney Richard Pachtman.

(10) Whether the knowing use of perjured testimony by a Deputy District Attorney shall be protected from liability to suit against the District Attorney by the victim of that perjury in a Federal Civil Rights suit under 42 U.S.C. 1983.

(11) Whether, in view of the substantial number of cases now in record involving 42 U.S.C. 1983 lawsuits against District Attorneys in the Federal Circuit Courts of Appeals reaching conflicting results, this Honorable Court should

finally resolve the conflict of authority now existing between the Ninth Circuit and such other circuits as the Fifth, Sixth, and Seventh Circuits.

Statement of Facts

Petitioner Paul Kern Imbler was convicted of murder in Los Angeles Superior Court in 1961. He was sentenced to death. The California Supreme Court affirmed. People v. Imbler, 57 C.2d 711 (1962). Imbler then filed a petition for Writ of Habeas Corpus in the California Supreme Court. That court issued an Order to Show Cause and an evidentiary hearing was held looking into the allegations that the conviction was obtained by the prosecution by the knowing use of perjured testimony, the prosecution being aware of the perjury and neglecting to correct same. Ignorning some of the evidentiary facts developed, the California Supreme Court acknowledged that perjury occurred but erroneously ruled that the prosecution was not aware of it. The writ was denied and petitioner Imbler was resentenced to death. In Re Imbler, 60 C.2d 554. A subsequent Writ of Habeas Corpus resulted in the death sentence being set aside for prosecution errors condemned by the People v. Morse, (60 C.2d 631) decision of the California Supreme Court. In Re Imbler, 61 C.2d 556 (1964).

Imbler then commenced Federal Habeas Corpus under 28 U.S.C. 2254 realleging prosecution perjury. Originally filed in the Eastern District of California, the petition was transferred to the Central District of California, where United States District Judge Warren J. Ferguson granted the Writ of Habeas Corpus for, inter alia, the knowing use by the prosecution of perjured testimony. Imbler v. Craven, 298 F. Supp. 795 (C.D. Calif. 1969), a copy of which is herewith

attached. The Ninth Circuit affirmed the granting of the writ. Imbler v. Craven, 424 F.2d 631 (9th Cir. 1970).

This Honorable Court denied certiorari, sought by the People, 400 U.S. 865. The prosecution declined to retry petitioner Imbler, and he was released after spending some 10 years in prison, four of which were spent on Death Row.

In 1971, the instant Federal Civil Rights suit was brought against District Attorney Richard Pachtman, who prosecuted Imbler, under 42 U.S.C. 1983, for money damages, for his knowingly using perjury to convict petitioner Imbler. The suit against District Attorney Pachtman was dismissed because of asserted "immunity" that a District Attorney supposedly "enjoys." The United States Court of Appeals affirmed this dismissal, Imbler v. Pachtman, ____ F.2d ____ as yet unpublished, (9th Cir. 1974), and a petition for rehearing and a suggestion for a hearing en banc was rejected on September 10, 1974. A copy of that order is herewith attached, as is the Ninth Circuit opinion affirming the dismissal.

The opinion affirming the dismissal was a 2-1 vote of the Ninth Circuit and once again reaffirmed the Ninth Circuit theory that District Attorneys are to be given full immunity for any illegal or unconstitutional behavior or deprivation of civil rights of any defendant upon whom they perform their prosecutorial function. Ney v. State of California, 439 F.2d 1285 (9th Cir. 1971); Agnew v. Moody, 330 F.2d 868 (9th Cir. 1964), as long as the act of the District Attorney was done within his "prosecutorial function."

The dissent by United States Circuit Judge John F. Kilkenny not only disagreed with the immunity given the District Attorney for his knowing use of perjury to convict Paul Kern Imbler, but pointed out several federal decisions

reaching a contrary result from other circuits. In addition to those cited late contrary decisions, other circuits have reached contrary results, and the same are cited elsewhere in this petition.

The best indication by this Honorable Court that these pseudo-asserted "privileges" against 42 U.S.C. 1983 lawsuits are not to be accorded to certain classes of persons is Scheuer v. Rhodes, ____ U.S. ____, April 17, 1974, and, in addition, the denial of certiorari in Shaw v. Garrison, a suit upheld by the Fifth Circuit against District Attorney James Garrison of New Orleans by one Clay Shaw. The United States District Court in Louisiana declined to dismiss the suit, and upon certification to the Fifth Circuit, that court as well declined to dismiss the suit. Upon seeking review in this Honorable Court, this Honorable Court declined to review the order denying dismissal against District Attorney Garrison because of some asserted immunity enjoyed by a District Attorney. 409 U.S. 1029, noted in the dissent in the case now at bar by Ninth Senior Circuit Judge John F. Kilkenny.

We thus offer for national resolution the critical issue of the scope of immunity to be accorded District Attorneys for suits against them under the Federal Civil Rights Act, 42 U.S.C. 1983, with the added reason for granting certiorari the necessity to resolve a clear-cut conflict of result in decisions on this issue from the various United States Circuit Courts of Appeals.

We feel that clear decisions in the Fourth, Fifth, Sixth, Seventh and Eighth Circuits have resolved the issue now before this Court in the direction of allowing the maintaining of such a cause of action under 42 U.S.C. 1983 against a District Attorney. The Ninth Circuit is thus clearly and modernly "out of step" with the other major

circuits, calling for a resolution of this conflict by this Honorable Court.

It is true that this Honorable Court has never resolved this critical issue, Holton v. Boman, 493 F.2d 1176, 1177, fn. 2 (7th Cir. 1974), and the multiplicity of cases going both ways suggests that the matter must now be resolved.

We have before this Court as petitioner Paul Kern Imbler, who was granted a Federal Writ of Habeas Corpus under 28 U.S.C. 2254 for the very reason that defendant District Attorney Richard Pachtman knowingly used and suffered perjured prosecution evidence and testimony to be used to convict him of murder and sentence him to death in 1961. Petitioner Imbler served 10 years in State Prison, four of them on Death Row.

We offer for national resolution the simple question whether the knowing use of perjured testimony by a prosecutor is "within the scope of his prosecutorial function" so as to insulate him from liability under a Federal Civil Rights lawsuit brought under 42 U.S.C. 1983, where, specially, as here, there has already been a grant of a Writ of Habeas Corpus on the facts in the case by a distinguished United States District Judge after a thorough study of the records in the case. Imbler v. Craven, 298 F. Supp. 795 (C.D. Calif. 1969).

We assert that the knowing use of perjury by a state prosecutor has been so thoroughly condemned in decisions of this Honorable Court, Mooney v. Holohan, 284 U.S. 103, Giles v. Maryland, 386 U.S. 66, Napue v. Illinois, 360 U.S. 264, Alcorta v. Texas, 355 U.S. 24, Hysler v. Florida, 315 U.S. 411, Pyle v. Kansas, 317 U.S. 213, Miller v. Pate, 387 U.S. 1, Giglio v. United States, 405 U.S. 150, and DeMarco v. United States, ____ U.S. ____, 39 L.Ed.2d 501 (1974), that it can

not be seriously contended that such behavior is within the normal prosecutorial function of a Deputy District Attorney. Yet, in the case now at bar, the United States Ninth Circuit, with two judges so stating, believes that as long as the behavior occurs during the trial as an "integral part of the prosecution act," it is not actionable. Since other circuits hold that it is actionable under 42 U.S.C. 1983, a severe equal protection problem is created and now should be resolved. Realistically, United States Circuit Judge John F. Kilkenny in dissent, citing the national authority from other circuits, found a valid cause of action.

We pray that certiorari be granted to resolve this important national issue, upon which the major United States Circuit Courts of Appeal are now in conflict.

Argument in Support of Grant of Petition for Writ of Certiorari

I

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO RESOLVE ON A NATIONAL BASIS THE SCOPE OF IMMUNITY TO BE ACCORDED TO A DEPUTY DISTRICT ATTORNEY UNDER THE FEDERAL CIVIL RIGHTS ACT, 42 U.S.C. 1983, AND RELATED STATUTES, WHERE THAT DEPUTY DISTRICT ATTORNEY HAS KNOWINGLY USED PERJURED TESTIMONY TO CONVICT A CRIMINAL DEFENDANT, THIS PETITIONER, AND WHERE A FEDERAL WRIT OF HABEAS CORPUS UNDER 28 U.S.C. 2254 WAS SPECIFICALLY GRANTED FREEING THIS PETITIONER FOR SAID ILLEGAL USE OF PERJURED TESTIMONY ON THE PART OF THE DEPUTY DISTRICT ATTORNEY, IMBLER V. CRAVEN, 298 F. Supp. 795 (C.D. Calif. 1969), AFFIRMED, 424 F.2d 631 (9th Cir. 1970), Cert. denied, 400 U.S. 865.

The scope of immunity to be "enjoyed" by a state prosecutor to a Federal Civil Rights suit brought against

him by a person who has been deprived of his civil rights by that prosecutor has not been defined by this Honorable Court. It should be so defined by a major opinion.

On March 28, 1974, in Holton v. Boman, 493 F.2d 1176, 1177, fn. 2 (7th Cir. 1974), the United States Court of Appeals for the Seventh Circuit noted, inter alia, that

> "...As of the date of this opinion the Supreme Court has not yet defined the scope of immunity enjoyed by a state prosecutor..."

Somewhat earlier, on August 24, 1973, in Hampton v. City of Chicago, 484 F.2d 602, 608 (7th Cir. 1973), the Seventh Circuit observed that

> "The scope of immunity enjoyed by a state prosecutor has not yet been defined by the Supreme Court."

We offer in this petition for certiorari a full opportunity to define the scope of immunity to be "enjoyed" by the nation's prosecutors.

At the District Court level, suit was brought by the petitioner Paul Kern Imbler against a Los Angeles County Deputy District Attorney, Richard Pachtman, for money damages under the Federal Civil Rights Acts, 42 U.S.C. 1983, alleging that District Attorney Pachtman had knowingly used perjured testimony to convict Imbler and sentence him to death in the California gas chamber in 1960. Importantly, the United States District Court for the Central District of California, Honorable Warren J. Ferguson, United States District Judge, had granted a Federal Writ of Habeas Corpus freeing Imbler after 10 years in prison, inter alia, for the knowing use of perjury on the part of the Deputy District Attorney, and among other reasons, including wilful suppression of evidence by the entire prosecution team. Imbler v. Craven,

298 F. Supp. 795 (C.D. Calif. 1969), a copy of which is herewith attached to this petition for certiorari.

Thus, unlike almost all federal civil rights suits brought under 42 U.S.C. 1983, the instant suit was supported by a Federal District Court decision already establishing the allegations made in the federal civil rights complaint. 298 F. Supp. 795.

We present for resolution by this Honorable Court whether a state prosecutor should be clothed with a cloak of immunity for violating his oath of office in engaging in the nondiscretional act of knowingly and premeditatively using, and gathering evidence to use, perjurious testimony to achieve a conviction in a capital trial for first degree murder, when suit is brought against him under 42 U.S.C. 1983 and related statutes of the Federal Civil Rights Act.

We contend, and ask resolution of, that a District Attorney shall not be clothed with such immunity when he engages in the prohibited act of knowingly using perjury to achieve a conviction for murder and resulting death sentence, where such decision is obviously not one that he can exercise discretion about, but is forbidden by his oath and forbidden by decisions of this Honorable Court. Mooney v. Holohan, 284 U.S. 103; Giles v. Maryland, 386 U.S. 66; Napue v. Illinois, 360 U.S. 264; Alcorta v. Texas, 355 U.S. 24; Hysler v. Florida, 315 U.S. 411; Pyle v. Kansas, 317 U.S. 213; Miller v. Pate, 387 U.S. 1; Giglio v. United States, 405 U.S. 150; DeMarco v. United States, ——— U.S. ——— , 39 L.Ed.2d 501 (1974).

It is too well established to require more than passing comment to observe that the nation's prosecutors not only do not have "discretion" to use perjured testimony to achieve a conviction, but on the contrary they are absolutely forbidden

to do so. Wilful suppression of key evidence is fully equivalent. Brady v. Maryland, 373 U.S. 83.

At 298 F. Supp. 795, 806, the Federal Habeas Corpus decision granting relief to this petitioner, Paul Kern Imbler, United States District Judge Warren J. Ferguson ruled and found:

> "As set forth above, Costello's testimony was materially false in at least six respects. As to his false statement that he was 'voluntarily' committed to a certain state hospital in 1946, when in fact he was committed because he had been adjudicated insane, this court finds that the prosecuting attorney had actual and definite knowledge that such statement was false. He not only permitted that statement to stand, an act itself expressly prohibited by Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), but he purposely and intentionally led the witness to make it. Twice in his questioning, the prosecutor himself referred to the commitment as 'voluntary,' although his testimony at the hearing establishes that he indeed knew better. His justification for using that terminology, to be consistent with the witness' understanding of the situation, finds no basis in the law. Where a prosecutor knowingly permits false evidence to be introduced in a trial, and such evidence will inevitably create a false impression in the minds of the jury, no legal justification for that misrepresentation can exist. If the prosecutor wished to avoid for the sake of convenience the term 'involuntary,' he could have readily done so;

> there was absolutely no necessity for a substitute adjective, and use of an erroneous one was highly improper. The prosecutor also stated that he intended to let the jury 'decide' with respect to the voluntariness of the commitment, having presented to them the 'facts.' The one fact, however, which he had, and which the jury did not, was that the commitment was not voluntary."

Further, United States District Judge Ferguson found that the prosecutor had personal knowledge of other falsehoods; at 298 F. Supp. 798, 807, the District Court found:

> "The fact that Costello had been convicted of more than one felony was also known to the prosecuting attorney. He admittedly examined the witness' 'make sheet,' which indicated at least two others. At the state hearing the prosecutor somewhat evasively testified that he had examined the 'make sheet,' but stated he had looked at 'as a whole,' and not to its specific parts. Respondent cannot deny knowledge of facts which it had before it and which its agent admittedly examined. That the agent may have ignored those facts does not relieve the state of its responsibility. This is not mere negligence in failing to ascertain the facts. It is, at best, deliberate failure to take full notice of their significance. Thus, this case is vastly different from Taylor v. United States, 229 F.2d 826 (8th Cir.), cert. denied, 351 U.S. 986, 76 S.Ct. 1055, 100 L.Ed. 1500 (1956), in which petitioner attempted to charge the prosecution with 'implied' knowledge of the contents of certain

Narcotics Bureau records which allegedly would have refuted what a witness told Narcotics Agents. Here, petitioner need not rely on the mere existence of official records. The facts with which respondent is charged were either in fact known to the prosecuting attorney, the investigating officers, or were contained in documents which the prosecutor had actually examined.

"By virtue of the same principles, the prosecution had reason to believe that Costello had not been attempting to 'straighten out.' Therefore, by asking Costello whether he had been so doing, the prosecutor knowingly attempted to create an impression in the minds of the jurors which he knew was false. For example, as discussed above, the prosecutor personally knew of the pending bak check charge against Costello. In addition, he had examined the witness' 'make sheet' which indicated, among other things, two offenses and a parole violation in the period of time involved, and the police officer (who had been present at the trial) knew of additional bad checks issued by Costello that were still outstanding.

"The final items of Costello's false testimony are the references to the witness' two alleged university degrees and his claimed annual income. This court has above described the facts known by the prosecutor about Costello. For a man with a history of felony convictions and state mental hospital commitments, such a success story is highly suspect, particularly when coupled with the known fact that Costello had been in

prison until November of 1953, and yet he claimed to have received his second degree, through night school, at a university in 1954. This rather incredible story was given in full to the jury as the result of leading questions by the prosecutor."

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It is thus established beyond peradventure that the prosecutor with full knowledge of the falsity of certain key prosecution testimony not only allowed it to stand when presented, but overtly led the chief prosecution witness in giving it after planning and discussing this testimony with him before he took the stand. During the trial (298 F. Supp. at 802) the defendant prosecutor Pachtman warded off police officers arriving in the courtroom to arrest the chief prosecution witness, Alfred Costello, for writing "bad checks" until he could place the witness Costello on the stand and lead him into his false and nefarious testimony. With knowledge that the chief witness had been in prison from 1951 through November of 1953, the prosecutor led that same chief witness Costello into the false story that the witness received a four-year degree in business from the University of California and in the genius-level time of two years, and had received, in addition, a degree in engineering at the University of Southern California in 1954, just a few months following his November 1953 discharge from California's San Quentin State Prison. (298 F. Supp. at 802, 803) The prosecutor failed to disclose or reveal the fact that the chief witness was in prison all this time, although defense cross examination sought knowledge of his commitments to various state institutions. Brady v. Maryland, 373 U.S. 83. It is a denial of due process to wilfully suppress evidence asked for under oath by the defense. The prosecutor had knowledge of this false evidence. 298 F. Supp. 795.

In short, we assert that when a prosecutor undertakes a prosecution for a state entity, he does not have the discretionary right to use knowing perjury to achieve the conviction, nor is such use of perjury within the scope of any purported judicial or quasi-judicial function. As such, the

prosecutor should be held liable under a 42 U.S.C. 1983 suit, where, as here, a Federal District Court has freed the prosecutor's victim precisely for that knowing use of perjury.

A recent significant Sixth Circuit opinion supports the denial of a cloak of immunity to a state prosecutor wilfully suppressing evidence tending to exonerate a female defendant being tried for murder. Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972), Cert. den. 409 U.S. 1029.

The Sixth Circuit posed as its duty the resolution of the questions (465 F.2d 1212, 1213):

> "To what extent does a prosecuting attorney have civil immunity in a suit filed by a defendant whom he has prosecuted in a criminal proceeding? This recurring question is presented on the present appeal."

Noting that the prosecutor in Hilliard v. Williams, supra, had wilfully suppressed a chemical laboratory report showing blood stains were in fact "hog blood" rather than "human blood," and where the identifications of said blood had played a critical role in the prosecution and conviction of the plaintiff Hilliard, as to the 42 U.S.C. 1983 lawsuit, the Sixth Circuit said: (465 F.2d at 1218)

> "We hold that the factual averments of the complaint (under 42 U.S.C. 1983) as summarized above, considered in a light most favorable to plaintiff, charge the District Attorney General with acts which were outside his quasi-judicial capacity and beyond the scope of 'duties constituting an integral part of the judicial process.' We are not willing to extend the doctrine of quasi-judicial immunity to a complaint

charging deliberate suppression of an FBI laboratory report establishing the innocence of the defendant." (465 F.2d 1212, 1218) (Sixth Circuit, 1972)

We note that this Honorable Court denied certiorari in Hilliard v. Williams, supra, 409 U.S. 1029, suggesting agreement of this Honorable Court with the proposition that a state prosecutor should not be cloathed with phony immunity for such an intentional act of wrongdoing.

Likewise, this Honorable Court denied certiorari and application for mandamus in Garrison v. Brown, 405 U.S. 985 (1972), involving an action for civil rights damages under 42 U.S.C. 1983 against District Attorney Jim Garrison of New Orleans for his prosecution of Clay Shaw on the charge of conspiring to assassinate President John F. Kennedy. See the note of this fact in Hilliard v. Williams, 465 F.2d 1212, 1217 (6th Cir. 1972). Previously, the Fifth Circuit had declined to dismiss the suit against Garrison on any so-called "prosecutorial immunity," and we can only believe that the denial of certiorari in the Fifth Circuit case of Garrison v. Brown, 405 U.S. 985, and the denial of certiorari in the Sixth Circuit case of Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972) at 409 U.S. 1029 suggests that this Honorable Court is not willing to extend the doctrine of quasi-judicial immunity to errant District Attorneys who wilfully and intentionally deprive a criminal defendant of his civil rights.

Nonetheless, a fully briefed and argued case before this Honorable Court on the scope of immunity to be accorded to District Attorneys is now clearly mandated. This is said because (1) the issue to be resolved is of oft-recurring national scope, arising in several late cases; (2) there is

a severe conflict of results in the circuits; compare Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972) with Imbler v. Pachtman, ____ F.2d ____(9th Cir. 1974), the case at bar; (3) the denial of certiorari in this case would create the anomalous and confusing result that this Honorable Court sanctioned both the refusal to dismiss cases (Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972), cert. den. 409 U.S. 1029, and Garrison v. Brown, cert. den. 405 U.S. 985), and the dismissal cases (Imbler v. Pachtman, ____ F.2d ____ , July, 1974), a result hardly in keeping with two of the functions of this Honorable Court:

(1) to resolve conflicts in the circuits, and

(2) to resolve severe national issues arising out of litigation in its supervisory role over the lower federal court system. See Mesarosh v. United States, 352 U.S. 1 (1956); Imbler v. Craven, 298 F. Supp. 795, 805 (C.D. Calif. 1969).

We pray that a writ of certiorari be granted to review that certain 2-1 decision in Imbler v. Pachtman, ____ F.2d _____ , (9th Cir. 1974), rehearing denied and suggestion for hearing en banc denied on September 10, 1974, because of (1) the significant and as yet unresolved issue presented, (see Holton v. Boman, 493 F.2d 1176, 1177, fn. 2 (7th Cir. 1974); and (2) because of the clear conflict of authority in the United States Courts of Appeals for the various circuits; compare Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972) with Imbler v. Pachtman, _____ F.2d ____ (9th Cir. 1974), the instant case, herewith attached, but as yet unpublished.

II

THIS HONORABLE COURT, IN ITS SUPERVISORY ROLE OVER THE LOWER FEDERAL COUPT SYSTEM, SHOULD GRANT CERTIORARI TO RESOLVE A CURRENT SEVERE CONFLICT OF AUTHORITY IN THE VARIOUS UNITED STATES CIRCUIT COURTS OF APPEAL ON THE ISSUE OF SCOPE OF IMMUNITY TO BE ACCORDED DISTRICT ATTORNEYS UNDER 42 U.S.C. 1983 AND RELATED STATUTES OF THE FEDERAL CIVIL RIGHTS ACTS, AN ISSUE OF RECURRING NATURE, WHICH HAS NEVER BEEN RESOLVED BY THIS HONORABLE COURT.

It is well recognized that one of the prime precursors for this Honorable Court to grant certiorari in any federal matter emanating from the circuits is a clear conflict of results among the circuits. That clear conflict of results is clearly evident in the nationally important issue of scope of immunity to be accorded to District Attorneys who are made defendants in lawsuits filed under the Federal Civil Rights Acts, 42 U.S.C. 1983 and related sections.

We count several major opinions reaching essentially opposite results to that reached by the United States Court of Appeals for the Ninth Circuit in the case at bar, Imbler v. Pachtman, ____ F.2d ____ (9th Cir. 1974), and which preclude a dismissal of the case on the pleadings as was done in the case now at bar.

Really only one major opposite opinion is necessary to establish the asserted conflict, but there are others. A clear-cut opposite opinion is HIlliard v. Williams, 465 F.2d 1212 (6th Cir. 1972), a copy of which is herewith attached, cert. den. 409 U.S. 1029; the Hilliard v. Williams case was approved by the dissent in the instant 2-1 decision affirming the dismissal, Circuit Judge John F. Kilkenny dissenting.

Further, it would appear that the Fifth Circuit does

not approve of the dismissal on the pleadings, Garrison v. Brown, cert. den., 405 U.S. 985 (1972); Hilliard v. Williams, 465 U.S. 1212, 1217 so noting.

An earlier Fifth Circuit case also established that the Fifth Circuit did not sanction the dismissal against a Deputy District Attorney who acts "without authorization of law" in depriving a person of civil rights. In Lewis v. Brautigam, 227 F.2d 124, 129 (5th Cir. 1955), the Court said:

> "A quasi-judicial officer, such as a prosecuting attorney, who acts outside the scope of his jurisdiction and without authorization of law, can not shelter himself from liability by the plea that he is acting under color of office."

It is clear that the knowing use of perjured testimony is without authorization of law, and is illegal, and deprives a criminal defendant of due process of law, and can not be an act for which a District Attorney is ever authorized to engage. Mooney v. Holohan, 284 U.S. 103; Giles v. Maryland, 386 U.S. 66; Napue v. Illinois, 360 U.S. 264; Alcorta v. Texas, 355 U.S. 24; Hysler v. Florida, 315 U.S. 411; Pyle v. Kansas, 317 U.S. 213; Miller v. Pate, 387 U.S. 1; see also Mesarosh v. United States, 352 U.S. 1 (1956); see Imbler v. Craven, 298 F. Supp. 795 (C.D. Calif. 1969) and the cases cited. See late decisions of this Court, Giglio v. United States, 405 U.S. 150, and DeMarco v. United States, ____ U.S. ____, 39 L.Ed.2d 501 (1974) in full accord. The knowing use of perjury by a prosecuting attorney is "without authorization of law" nationally, and would support a 42 U.S.C. 1983 cause of action in the Fifth Circuit.

Moreover, the Fourth Circuit provides immunity if and only if the act assailed is a discretional act done in good faith, where the District Attorney can exercise a legitimate

right to either do the act or not do the act.

In McCray v. Maryland, 456 F.2d 1, 3 (4th Cir. 1972), the Court said:

> "The immunity of quasi-judicial officers such as prosecuting attorneys and parole board members derives, not from their formal association with the judicial process, but from the fact that they exercise a discretion similar to that exercised by judges. Like judges, they require the insulation of absolute immunity to assure the courageous exercise of their discretionary duties. Where an official is not called upon to exercise judicial or quasi-judicial discretion, courts have properly refused to extend to him the protection of absolute judicial immunity, regardless of any apparent relationship of his role in the judicial system."

It is clear that the decision to use or not use perjured testimony in a criminal prosecution is not an act of discretion, for it is absolutely forbidden, and is moreover a denial of due process of law to its victim. Mooney v. Holohan, 284 U.S. 103; Giles v. Maryland, 386 U.S. 66; Napue v. Illinois, 360 U.S. 264; Alcorta v. Texas, 355 U.S. 24; Hysler v. Florida, 315 U.S. 411; Pyle v. Kansas, 317 U.S. 213; Miller v. Pate, 387 U.S. 1; United States v. Giglio, 405 U.S. 150; DeMarco v. United States, ——— U.S. ——— , 39 L.Ed.2d 501 (1974). See also Imbler v. Craven, 298 F. Supp. 795 (C.D. Calif. 1969) and the cases cited.

We conclude, therefore, that the Fourth Circuit would allow the maintenance of a 42 U.S.C. 1983 lawsuit against a District Attorney under the allegations of the complaint dismissed herein by the District Court and said dismissal

being affirmed by the Ninth Circuit.

We further suggest that late decisions in the Seventh Circuit provide a cause of action against a prosecutor, denying the dismissal on the pleadings. Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973); Holton v. Boman, 493 F.2d 1176 (7th Cir. 1974).

The trial level courts of the United States Court of Appeals for the Eighth Circuit allows the maintenance of the cause of action against the District Attorney. Haaf v. Grams, 355 F. Supp. 542 (D.C. D. Minn. 1973), where the District Court held, at 545:

> "...Plaintiffs allege here that defendant Ahles withheld exculpatory evidence. It has been specifically held that a prosecutor who withholds evidence is liable under Section 1983 when the criminal charges are eventually determined in favor of the one charged. Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972) It therefore appears that plaintiff Janette Haaf has alleged sufficient facts which, if proved, would result in liability. Such questions of fact may not be determined on motion..."

We thus assert that the Fourth Circuit, McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972), the Fifth Circuit, Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955) and Garrison v. Brown, cert. den. 405 U.S. 985, the Sixth Circuit, Hilliard v. Williams, 465 U.S. 1212 (6th Cir. 1972), the Seventh Circuit, Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973) and Holton v. Boman, 493 F.2d 1176 (7th Cir. 1974), and the Eighth Circuit trial courts in adopting Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972), see Haaf f. Grams, 355 F. Supp. 542, 545 (D.C.D. Minn. 1973), all provide contrary

authority to the instant Ninth Circuit opinion in Imbler v. Pachtman, ____ F.2d ____ (1974), and this clear conflict of authority should cause the grant of certiorari to resolve the disparity and establish a single national authority.

We urge that this Court grant certiorari to resolve this severe national issue arising time after time in 42 U.S.C. 1983 litigation. We are of the opinion, as is dissenting Circuit Judge Kilkenny in the case at bar, that the "shield of immunity" should (not) rest on the brow of a District Attorney who knowingly, wilfully and maliciously utilizes perjured testimony to obtain a conviction. This conduct should not be condoned as an integral part of the judicial process." (Emphasis that of the court.) (Page 8, opinion, Imbler v. Pachtman, ____ F.2d ____ (9th Cir. 1974), herewith attached.)

We pray that certiorari issue to review this decision and resolve the conflicts in the circuits.

III

IN VIEW OF THIS HONORABLE COURT'S OPINION IN SCHEUER V. RHODES, _____ U.S.____ , ____S.Ct.____ , _____ L.Ed.2d____ , 42 U.S.L.W. 4543 , April 17, 1974, DENYING IMMUNITY TO EXECUTIVE OFFICERS OF A STATE UNDER A 42 U.S.C. 1983 LAWSUIT, THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO RESOLVE WHETHER A PROSECUTOR IS NOT MORE PROPERLY AN ARM OF THE EXECUTIVE BRANCH OF GOVERNMENT AND THEREFORE WHETHER HIS IMMUNITY, IF ANY, TO SUIT UNDER 42 U.S.C. 1983 IS NOT MORE PROPERLY TO BE MEASURED BY ASSERTED "EXECUTIVE IMMUNITY" RATHER THAN "QUASI-JUDICIAL" IMMUNITY.

We here suggest that the oft-quoted "quasi-judicial" immunity "enjoyed" by prosecutors is misplaced and misquoted,

for they are truly branches of the executive arm of the government. In the federal domain, all United States attorneys are under the justice department, which is in turn under the jurisdiction of the Attorney General of the United States, a cabinet level post directly appointed by the President. A prosecutor of course stands on no different level than his opposing defense attorney, both of them supposedly urging in an adversary manner their contentions on a neutral trial judge, himself a member of a totally different branch of government, the judicial.

To assert that one party to the adversary trial, the prosecutor, derives "immunity" because he is "quasi-judicial" confounds the logic of the rational thought processes. As certiorari should be granted in the case at bar because of (1) the profound and recurring national question presented and (2) because of a conflict in the circuits, we suggest that this Honorable Court direct attention to and certify as a question for resolution the foregoing rather bona fide inquiry into the classification of the country's prosecutors in a "quasi-judicial" role so as to accord to them some pseudo-immunity.

Indeed, the duties and obligations of prosecutors are different from and stand on a higher level than a defense attorney, inasmuch as they represent "all of the people," even the defendant to whom they must disclose helpful evidence under their control.

The Sixth Circuit noted this duty of the prosecutors in Hilliard v. Williams, 465 F.2d 1212,1217 (6th Cir. 1972), thusly:

> "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This

special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused.

"DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.

"(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

"(B) A public prosecutor or other government lawyer in criminal litigation shall make timely

disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

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Dissenting Judge John F. Kilkenny adopted many of these regulations and restrictions in his dissent in the 2-1 opinion under review, Imbler v. Pachtman, ____ F.2d ____ (9th Cir. 1974).

We suggest the foregoing executive-judicial resolution as an alternate and concomitant ground for grant of certiorari.

Conclusions

For each of the foregoing reasons, (1) the resolution of a de novo issue of national importance, (2) the resolution of a clear-cut and severe conflict in the circuits, and (3) the clarification of the role of the prosecutor as "executive" rather than "quasi-judicial," in 42 U.S.C. 1983 litigation, we pray that certiorari issue to review that certain 2-1 decision in Imbler v. Pachtman, ____ F.2d ____ (9th Cir. 1974).

Dated: October 5, 1974

Respectfully submitted,

Roger S. Hanson
Attorney for Paul Kern Imbler
Member of the Bar
United States Supreme Court
U.S. Court of Appeals, 9th Circuit

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL KERN IMBLER, *Plaintiff-Appellant*,

vs.

RICHARD PACHTMAN, DE WITT LIGHTNER, SANFORD MCCALEB, DONAL H. SEARS, KENNETH SCARCE, and ECTOR A. GARCIA, *Defendants-Appellees.*

No. 72-2518

OPINION

[July 12, 1974]

Appeal from the United States District Court for the Central District of California

Before: KOELSCH, HUFSTEDLER and KILKENNY, Circuit Judges.

KOELSCH, Circuit Judge:

This matter has a long history. In 1961 plaintiff-appellant Imbler was convicted on a murder charge in Los Angeles Superior Court and sentenced to death. The California Supreme Court affirmed. *People v. Imbler*, 57 Cal. 2d 711 (1962). Thereafter, Imbler's state habeas corpus petition was denied following an evidentiary hearing. *In re Imbler*, 60 Cal. 2d 554 (1963). A subsequent writ set aside the death penalty, *In re Imbler*, 61 Cal. 2d 556 (1964); and when the state declined to prosecute another "penalty trial," Imbler was given a life sentence.

In 1969 the United States District Court, concluding that Imbler's conviction was secured in part by testimony the prosecution knew, or had strong reason to know, was perjured, granted him a writ of habeas corpus. *Imbler v. Craven*, 298 F. Supp. 795, 809 (1969). We affirmed, *Imbler v. Craven*, 424 F.2d 631 (9th Cir. 1970), *cert. denied*, 400 U.S. 865.

Imbler then brought this suit for damages. So far as need be noticed, his allegations in substance are that the defendant

Pachtman, the district attorney who prosecuted the criminal charges on behalf of the State of California, had knowingly, maliciously, etc., used perjured testimony to secure a conviction and hence was liable in damages for violation of his, Imbler's, civil rights. The district judge dismissed Imbler's complaint as to Pachtman without leave to amend; he ruled that Pachtman, as a prosecuting attorney, enjoyed an immunity from suit for acts committed "in the performance of duties constituting an integral part of the judicial process . . .", *Marlowe v. Coakley*, 404 F.2d 71 (9th Cir. 1968); *see Robichaud v. Ronan*, 351 F.2d 533 (9th Cir. 1965); and that as a matter of law the acts complained of came within a quasi-judicial prosecutorial function to which immunity attached. Imbler appeals.[1] We affirm.

The district court's dismissal of appellant's claim was consistent with our prior decisions. *Ney v. State of California*, 439 F.2d 1285 (9th Cir. 1971); *Donovan v. Reinbold*, 433 F.2d 738, 743 (9th Cir. 1970); *Marlowe v. Coakley, supra; Clark v. Washington*, 366 F.2d 678 (9th Cir. 1966); *Robichaud v. Ronan, supra; Agnew v. Moody*, 330 F.2d 868 (9th Cir. 1964); *Harmon v. Superior Court*, 329 F.2d 154 (9th Cir. 1964); *Sires v. Cole*, 320 F.2d 877 (9th Cir. 1963). The acts of the defendant which allegedly harmed appellant occurred during prosecutorial activities which can only be characterized as an "integral part of the judicial process."[2] All involved the questioning of a witness dur-

[1]As appears from the caption, there are several defendants. In ruling against Imbler the court directed entry of judgment immediately, R. 54 (b), F. R. Civ. P. The appeal from the ensuing limited judgment is thus valid.

[2]The dissent argues that deliberate suppression of evidence or subornation of perjured testimony is unprotected by quasi-judicial immunity because such acts, being improper exercises of prosecutorial power, are not an integral part of the judicial process; the dissent therefore concludes that our prior cases do not confer immunity when the complaint charges knowing and malicious abuse of prosecutorial power. The purported distinction undermines the purpose of the absolute immunity previously recognized, because the additioin of an easy to make but difficult to prove charge of knowing and malicious prosecutorial misconduct to any complaint would suffice to require a full trial on the merits of the prosecutor's conduct while acting as a judicial officer.

More importantly, the distinction is clearly inconsistent with our prior cases. In *Robichaud v. Ronan, supra*, the court indicated that a prosecutor's immunity is absolute when engaged in quasi-judicial activities,

ing the 1961 criminal prosecution.[3]

Appellant, in effect, urges us to reject the doctrine of prosecutorial immunity and overrule a long line of this court's decisions. We decline to do so. The protection given a prosecutor acting in his quasi-judicial role protects not simply the prosecutor, but, more importantly, the effective operation of the judicial process, and hence the "common good." Because both the honest and dishonest are insulated, on occasion an injury without redress inevitably results; but, as well expressed by Judge Learned Hand:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with

noting that no suit for malicious prosecution could be brought regardless of the existence of malice or even willfulness on the part of the prosecuting attorney. *See* 351 F.2d at 536. Equally in point is *Marlowe v. Coakley, supra:* the dissent's "monumental distinction" of *Marlowe* is spurious. The complaint there alleged that the prosecuting attorney knowingly and willfully, or with gross negligence, presented perjured testimony to the grand jury investigating plaintiff's activities and that he suppressed from the grand jury exculpating evidence within his knowledge, again willfully and deliberately. In ruling on the district court's dismissal under Rule 12b(6), the court necessarily had to evaluate the claim assuming that the charges of willful perjury and suppression were true. Notwithstanding these allegations, the court held that the district attorney, in presenting evidence to the grand jury, was acting within the scope of his duty to advise and present information to the grand jury, and that this function is an integral part of the judicial process. In short, the dissent's approach to prosecutorial immunity has been rejected in this circuit.

[3]Appellant contends the defendant engaged in non-immune police activity when he asked two police officers, seeking, during a recess in the trial, to discuss a criminal charge with the prosecution's chief witness, to wait until the end of the witness's testimony. We reject the contention. A prosecutor's request for an opportunity to complete an examination during a trial is a quasi-judicial act within the purposes of the immunity. More critically, the request to the police did not in itself deprive appellant of any civil right. Even if the defendant had then been acting in a police role, only the subsequent inducement of the testimony that the witness was trying to "straighten out," when the prosecutor had good reason to know the witness was in trouble, made the request to the officers legally relevant to appellant's civil rights; the questioning of a witness at trial is within a traditional prosecutorial function.

> the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The jurisdiction for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books." *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949).

As indicated earlier, the issue is not "*res nova*" in this circuit.[4] The "balance between the evils inevitable in either alternative"

[4]The dissent's reliance on the Supreme Court's latest pronouncement on the subject of immunity, *Scheuer v. Rhodes*, ... U.S. ....., 42 U.S.L.W. 4543 (April 17, 1974), holding that state executive officials are not absolutely immune from suit, is misplaced. If anything, *Scheuer* tends to support our conclusion. The Court there recognized (*Scheuer* at 4545 n.4; *see Pierson v. Ray*, 386 U.S. 547, 553-55 (1967)) that the immunity of executive officers has historically "been of a more limited nature" than that of judicial officers—undoubtedly because the threat of private liability as a sanction for abuse of power is less necessary in the judicial system, which provides institutionalized systems of review to correct errors. Prosecutorial immunity is not a form of executive immunity, but rather a form of judicial immunity, *Robichaud v. Ronan, supra*, at 536, designed to protect the judicial process; it attaches only to prosecutorial acts "constituting an integral part of the judicial process."

has consistently been struck in favor of protecting honest criminal prosecution, at the expense of those injured by scoundrels,[5] by granting immunity from suit to all prosecutors.[6]

The judgment is affirmed.

KILKENNY, Dissenting:

Although appellant's 22 page amended complaint, with 23 pages of exhibits, is admittedly repetitious and in places ambiguous, there is no question but that it charges appellee, Pachtman, with knowingly, wilfully and maliciously using eight different items of false material testimony in securing appellant's initial conviction. If this is true, I believe that appellee violated appellant's procedural due process rights, and that he should be stripped of his official or representative character and subjected in his person to the consequences of his individual conduct.

The Supreme Court decision in *Scheuer, Adm'x. v. Rhodes*, ... U.S. ....., 42 U.S.L.W. 4543 (April 17, 1974), the most recent expression of the Court on the overall subject, convinces me that, on these charges, the appellee does not have quasi-judicial, or any other, immunity. True enough, *Scheuer* involved state executive, rather than judicial, immunity. However, the Court in *Scheuer*, analyzed the long history behind executive, as well as judicial immunity, and noted that there was

[5]The reference is general and not intended as personal.

[6]Appellant contends, in substance, that the district court's determination in the habeas proceeding established defendant's violation and therefore assures that an "innocent" prosecutor is not being made to face a trial and potential liability. Wholly aside from the fact that the California Supreme Court, on precisely the same facts available to the district court (the district court did not hold an evidentiary hearing and relied on the factual findings of the referee in the California Supreme Court's habeas proceeding), found there was no evidence that the prosecutor knowingly used perjured testimony, *In re Imbler, supra*, at 565, those determinations are not *res judicata* as to the defendant: he was not a party to the habeas proceeding. Here, as in any other §1983 suit against a prosecutor, a determination of the claim would require a full trial. The burden and risk of that trial is precisely what the immunity is designed to prevent. If one prosecutor must face the risk of liability because of an ill-grounded exception to absolute immunity, then all potentially may, and the public purpose of the immunity is lost.

a ". . . similarity in the controlling policy considerations in the case of high echelon executive officers and judges . . ." (42 U.S.L.W. at 4547, n. 8); the policy considerations revolving, in large measure, around the continued assurance that public officials will continue to vigorously perform their public functions without threat of harassment by civil suit. All this being said, the Supreme Court went on to hold that high executive officers do not have an unqualified immunity from civil suit. The Court emphasized:

> "Under the criteria developed by precedents of this Court, § 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer has 'the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.' *Sterling v. Constantin*, 287 U.S. 378, 397 (1932)." 42 U.S. L.W. at 4548.

If, as held in *Scheuer*, the highest executive officer of a great state is not clothed with absolute immunity and, assuming that the policy considerations behind executive immunity are similar to those behind judicial immunity, then it must necessarily follow that a prosecuting attorney, shielded only by a form of judicial immunity (*Robichaud v. Ronan*, 351 F.2d 533 (CA 9 1965)), should not be elevated to a status which would place him above the chief executive officer of his state. Otherwise, the office of the district attorney, rather than the Constitution of the United States, becomes the Supreme Law of the Land. Of course, under our system of government, such a conclusion is clearly untenable. State officials in these circumstances should not escape the paramount authority of the Federal Constitution. I quote from *Sterling v. Constantin*, 287 U.S. 378, 398 (1932):

> "When there is a substantial showing that the exertion of state power has overridden private rights secured by [the] Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression."

Aside from my view that *Scheuer* is controlling, the cases cited by the majority, in my opinion, are clearly distinguishable.

For example, in *Ney v. State of California*, 439 F.2d 1285 (CA9 1971), the appellant charged the district attorney, or his deputy, with knowingly using altered tapes. The facts revealed, however, that the district attorney's deputy actually used the tapes and, therefore, if the district attorney could be sued at all, he would be liable only on a theory of *respondeat superior*. In *Ney*, this court stressed that the allegation of fact supporting the purported misconduct was based on ". . . much conclusionary language . . . ." 439 F.2d at 1287. In the instant case, the factual allegations charge the district attorney with engaging in specific instances of misconduct wholly reprehensible to the integrity of the judicial process.

Donovan v. Reinbold, 433 F.2d 738 (CA9 1970), is no more enlightening. There, the action was against two city police officers and two city attorneys. This court held that the doctrine of immunity from civil suit under § 1983 would not bar an action against them. Nothing in *Donovan* even remotely indicates that a civil rights action should not lie on our facts. For that matter, the opinion recognizes that:

> "[t]he purpose of according judicial immunity is to protect the integrity of the judicial process. It is not to shield lawyers *or judges* from liability for the invasion of another's federally secured constitutional rights, when the alleged invasion did not occur during the performance of acts that are an integral part of the judicial process." 433 F.2d at 743. [Emphasis supplied]

To now hold, on our facts, that the knowing, wilful and malicious use of perjured testimony to gain a conviction, even though accomplished during the course of a trial, constitutes an integral part of the judicial process, flies in the very face of the integrity sought to be protected by judicial and quasi-judicial immunity.

The allegations in *Marlowe v. Coakley*, 404 F.2d 70 (CA9 1968) charged the prosecuting attorney with ". . . knowingly and wilfully, *or with gross negligence*, present[ing] perjured testimony to the grand jury . . . ." [Emphasis supplied] Needless to say, there is a monumental distinction between charging an officer with gross negligence in connection with the presenta-

tion of perjured testimony and charging him with knowingly, wilfully and maliciously *using* perjured testimony to obtain a conviction. Consequently, the decision of the *Marlowe* court could well rest on the failure of the complainant to clearly charge wilful misconduct in presenting the perjured testimony. *Cf. Ney v. State of California, supra* at 1287. The alternative does not equate with wilful action. I decline to hold that the shield of immunity should rest on the brow of a district attorney who *knowingly, wilfully and maliciously* utilizes perjured testimony to obtain a conviction. This conduct should not be condoned as an *integral part of the judicial process*.

Clark v. State of Washington, 366 F.2d 678 (CA9 1966), recognizes the rule that a prosecuting attorney enjoys immunity under the Civil Rights Act only insofar as his prosecuting functions are concerned. At the risk of being repetitive, I again stress that appellee's acts, as charged in the amended complaint, had nothing to do with his *legitimate* prosecutory functions.

In *Agnew v. Moody*, 330 F.2d 868 (CA9 1964), *cert. denied* 379 U.S. 867, the court there sidestepped the contention that the doctrine of official immunity did not apply where the wrongful act was *of an extraordinary character*, as that phrase was used in *Tenney v. Brandhove*, 341 U.S. 367, 378-79 (1951), by saying, "[i]f such an indefinite exception to the immunity rule exists, we are satisfied that appellant's case does not fall within it." 330 F.2d at 869. *Scheuer, supra*, makes it clear that the doctrine of official immunity does not apply in cases where the wrongful act is of an extraordinary character.

Hilliard v. Williams, 465 F.2d 1212 (CA6 1972), *cert. denied* 409 U.S. 1029, is closely in point. There, the court, in a civil rights action, recognized the general rule that a prosecuting attorney, when acting in his official capacity, is immune from a suit for damages. The court then goes on to hold that 'the doctrine of quasi-judicial immunity, normally shielding a prosecuting attorney, should not be extended to the situation where a complaint charges that the officer deliberately suppressed material evidence which resulted in the conviction of the appellant. The court emphasized that such wilful conduct was ". . . outside [the officer's] quasi-judicial capacity and beyond the scope of 'duties constituting an integral part of the judicial process.'" 465 F.2d at 1218.

On the charges before us, I would hold that appellee acted entirely outside the scope of his jurisdiction and should not be permitted to shelter himself from liability by a plea that he was acting under the immunity of his office. Not to be forgotten is the high responsibility accepted by a prosecuting officer when he enters upon the duties of his office. For example: (1) he is required to recognize that in our system of justice, the accused is to be given the benefit of all reasonable doubt; (2) his decisions during the course of the prosecution must be fair to all, including the defendant; (3) he has a duty of timely disclosure to the defense of all available evidence known to him that tends to help the defendant, and (4) it is his duty to seek justice, not pervert it, by placing a conviction above the constitutional rights of the accused. It is time to recognize that prosecutors are not entirely above the law which holds other individuals financially accountable for their *intentional misdeeds*.

Needless to say, I express no opinion as to the merits of appellant's claims. I only say that on the basis of the allegations in the amended complaint, he is entitled to have a full-fledged judicial inquiry.

I WOULD REVERSE.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL KERN IMBLER, Plaintiff-Appellant, vs. RICHARD PACHTMAN, DE WITT LIGHTNER, SANFORD McCALEB, DONAL H. SEARS, KENNETH SCARCE, and ECTOR A. GARCIA, Defendants-Appellees.	)	NO. 72-2518

(Cc-71-123RJK)

Before: KOELSCH, HUFSTEDLER and KILKENNY, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING IN BANC

Judges Koelsch and Hufstedler voted to deny the petition for panel rehearing and to recommend against a rehearing in banc. Judge Kilkenny voted to grant the panel rehearing and recommended that the in banc rehearing be granted.

The full court having been duly advised and no judge of the court in active service having requested a vote on the suggestion for rehearing in banc, the petition for rehearing is denied, and the suggestion for rehearing in banc is rejected.

Prosecutor Cleared in Damage Suit

A prosecutor who helped send Paul Kern Imbler to prison on a holdup-murder conviction—which a federal judge later ruled was unfairly obtained with false evidence—has been dismissed as a defendant in a $2.7 million civil rights damage suit filed by Imbler.

The U. S. 9th Circuit Court of Appeals said Richard E. Pachtman, a Los Angeles deputy district attorney, was immune from suit for acts committed in the performance of duties constituting an integral part of the judicial process.

Imbler twice faced execution and served nearly 10 years in prison before being freed in 1971 by U. S. Dist. Judge Warren J. Ferguson.

His damage suit also named as defendants a number of other state, county and city officials involved in his arrest, prosecution or incarceration.

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LOS ANGELES TIMES, CIRCA July 15, 1974

branches, shall not be sold for less than double the minimum price of the public lands when sold.

Sec. 4. And be it further enacted, That the said lands hereby granted to the said State shall be subject to the disposal of the legislature thereof, for the purposes aforesaid and no other; and the said railroad and branches shall be and remain a public highway, for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

Sec. 5. And be it further enacted, That if the said railroad shall not be completed within ten years, the said State of Illinois shall be bound to pay to the United States the amount which may be received upon the sale of any part of said lands by said State, the title to the purchasers under said State remaining valid; and the title to the residue of said lands shall reinvest in the United States, to have and hold the same in the same manner as if this act had not been passed.

Sec. 6. And be it further enacted, That the United States mail shall at all times be transported on the said railroad under the direction of the Post-Office Department, at such price as the Congress may by law direct.

Sec. 7. And be it further enacted, That in order to aid in the continuation of said Central Railroad from the mouth of the Ohio River to the city of Mobile, all the rights, privileges, and liabilities hereinbefore conferred on the State of Illinois shall be granted to the States of Alabama and Mississippi respectively, for the purpose of aiding in the construction of a railroad from said city of Mobile to a point near the mouth of the Ohio River, and that public lands of the United States, to the same extent in proportion to the length of the road, on the same terms, limitations, and restrictions in every respect, shall be, and is hereby, granted to said State of Alabama and Mississippi respectively.

Approved, September 20, 1850.

Lilly Mae Onie Lee Whitelaw HILLIARD, Plaintiff-Appellant,

v.

John L. WILLIAMS, Defendant-Appellee.

No. 71-1983.

United States Court of Appeals, Sixth Circuit.

June 28, 1972.

As Amended July 31, 1972.

Damages action brought under the Civil Rights Act against district Attorney General who had prosecuted plaintiff in a criminal proceeding. The United States District Court for the Western District of Tennessee, Eastern Division, Harry W. Wellford, J., sustained a motion to dismiss for failure to state a claim upon which relief could be granted, and plaintiff appealed. The Court of Appeals, Harry Phillips, Chief Judge, held that doctrine of quasi-judicial immunity for a prosecuting attorney would not be extended to a complaint charging that district Attorney General deliberately suppressed at first murder trial of plaintiff, whose initial conviction was reversed and who was then acquitted at second trial, an FBI report establishing the innocence of plaintiff.

Reversed and remanded.

1. Courts ⇐100.3(4)

On appeal from dismissal of a civil rights action, averments of complaint must be treated as true by Court of Appeals and are to be viewed in light most favorable to complainant.

2. Federal Civil Procedure ⇐1773

Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief.

3. District and Prosecuting Attorneys ⇐10

A prosecuting attorney, when acting in his official capacity, is immune from suit for damages, provided his acts are within the scope of his jurisdiction and authorized by law.

4. District and Prosecuting Attorneys ⇐10

A quasi-judicial officer, such as a prosecuting attorney, who acts outside the scope of his jurisdiction and without authorization of law cannot shelter himself from liability by the plea that he is acting under color of office.

5. District and Prosecuting Attorneys ⇐10

Doctrine of quasi-judicial immunity for a prosecuting attorney would not be extended to a complaint charging that district Attorney General deliberately suppressed at first murder trial of plaintiff, whose initial conviction was reversed and who was then acquitted at second trial, an FBI report establishing the innocence of plaintiff. 28 U.S.C.A. §§ 1292(b), 1343(3); 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc. rule 12(b)(6), 28 U.S.C.A.

Dwayne D. Maddox Huntington, Tenn., Julian P. Guinn, Paris, Tenn., on brief, for plaintiff-appellant.

Bart Durham, Asst. Atty. Gen., David M. Pack, Atty. Gen., Nashville, Tenn., on brief for defendant-appellee.

Before PHILLIPS, Chief Judge, EDWARDS, Circuit Judge, and McALLISTER, Senior Circuit Judge.

PHILLIPS, Chief Judge.

To what extent does a prosecuting attorney have civil immunity in a suit filed by a defendant whom he has prosecuted in a criminal proceeding? This recurring question is presented on the present appeal.

The defendant-appellee is the District Attorney General for the Twenty-sixth Judicial District of Tennessee. He was prosecuting attorney at a trial resulting in the conviction of plaintiff-appellant Hilliard for second degree murder. This conviction was reversed by the Tennessee Court of Criminal Appeals on April 15, 1971. At the second trial Mrs. Hilliard was acquitted. In the meantime she had served one year in prison.

The evidence upon which Mrs. Hilliard was convicted at her first trial was entirely circumstantial. A key issue was whether stains on the nylon jacket worn by her at the time of her arrest were blood stains, and if so, whether the stains were from human blood as contended by the prosecution or hog blood as contended by the defense.

In reversing the conviction, the Tennessee Court of Criminal Appeals said:

"Of quite devastating impact tending to show guilt was the fact that the defendant had what appeared to be blood stains on her jacket. The State introduced proof of this, and then it was revealed that the jacket itself had been sent to the F.B.I. laboratory in Washington D. C. for chemical analysis and, although some three months had passed since the jacket had been taken from the defendant, it had not been returned for use at the trial; nor was there any information available to shed light on the vital issue of whether the blood was human as theorized by the State or hog as theorized by Mrs. Hilliard.

"Although, as aforesaid, no opportunity was allowed the trial court to correct any error that might have been involved in allowing the State's proof concerning the blood being on the jacket when it developed that the jacket itself was, by State action, unavailable, and thus we cannot consider the propriety of the court's rulings on the objections made during trial; the impact of this testimony does enter into our decision. The proof offered by the State relative to this blood was circumstantial as was all the other. But here there was an opportunity to make available to the jury direct

proof, in the face of the defendant's testimony that the blood was that of a hog, that would have supported one theory and discredited the other. Either the blood was human or swine. It is had been established as human, this would have left little room for doubt that the defendant was not telling the truth in her explanation of how she got blood on her clothing. If it developed that the blood was from a hog, this would have proved conclusively that she was telling the truth, in this particular at least.

"Certainly the two hypotheses suggested by the proof of blood on the jacket—one tending strongly to suggest guilt, the other tending to support the theory of the defendant—are equally reasonable. In its present condition the evidence offered by the defendant buttressed by the presumption of innocence never overcome by sufficient proof preponderates against the verdict."

Following her acquittal at the second trial, Mrs. Hilliard filed the present civil action for damages against the District Attorney General. Jurisdiction is asserted both on the ground of diversity of citizenship and under the civil rights act, 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3).[1]

The District Attorney General filed a motion to dismiss pursuant to Rule 12(b) (6), Fed.R.Civ.P. for failure to state a claim on which relief can be granted. The District Court sustained this motion, holding that the District Attorney General is immune from civil liability. We reverse, holding that the District Court erred in ruling that the complaint does not state a claim on which relief can be granted.

This is an interlocutory appeal under 28 U.S.C. § 1292(b). The District Court certified that the order of dismissal involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation. The District Court also directed the entry of final judgment as to the District Attorney General, making an express determination that there is no just reason for delay. Rule 54(b), Fed.R.Civ.P. This court granted leave to appeal.

[1, 2] Our reversal is based entirely upon the factual averments of the complaint, which are summarized hereinafter in this opinion. These averments must be treated as true for purposes of this appeal and are viewed in the light most favorable to Mrs. Hilliard. Lucarell v. McNair, 453 F.2d 836 (6th Cir. 1972), L'Orange v. Medical Protective Society, 394 F.2d 57, 59 (6th Cir. 1968). "In appraising the sufficiency of this complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

The complaint avers that Mrs. Hilliard is a citizen of Indiana; on or about December 24, 1969, she arrived in Carroll County, Tennessee, to visit her maternal aunt, Vina Prince, and the aunt's husband, Ernie Prince; the purpose of her visit was to assert and settle her claim to a one-half interest in certain real estate inherited from her grandmother; Ernie Prince had operated the land for many years and had claimed ownership from time to time; on February 19, 1970, Ernie Prince was killed and Mrs. Hilliard was arrested and charged with his murder.

The complaint further states that at the time of her arrest Mrs. Hilliard was wearing a blue nylon jacket which the officers claimed was stained with the blood of Ernie Prince; the victim was murdered by two vicious axe blows to the skull, and the body thereafter was dragged to the rear of the house and shot in the mouth with a shot gun. Mrs. Hilliard asserted that when she was arrested there was no blood on her jacket, but if there were any such stains it was hog blood from preparing raw meat.

The complaint asserts that circumstantial evidence pointed the finger of guilt to Vina Prince, who is insane. The opinion of the State Court of Criminal Appeals pointed out that Mrs. Prince was not available as a witness, due to her mental condition. The court commented:

"It is regrettable that she was not available as a witness . . . Since there is no doubt that this woman was present before, during, and after the assault of the deceased, her potential as a witness is quite evident. She could have witnessed the crime or have committed the crime herself."

It is averred that the only probative material evidence against Mrs. Hilliard was the allegedly blood stained jacket and some allegedly blood stained curtains; that the jacket and curtains were sent to the FBI laboratory in Washington, D. C., for analysis; that the FBI report was negative as to human blood, or any blood, being on either the jacket or the curtains; that the District Attorney General saw the FBI report well in advance of the trial and was familiar with its contents; that neither the FBI report nor the jacket and curtains were made available to be introduced in evidence at the trial; that the contents of the FBI report were never divulged to Mrs. Hilliard or her attorney; instead, it was claimed by the prosecution that the jacket and curtains had been resubmitted to the FBI on April 28, 1970, at a time when the trial already had been set for May 15, 1970, too late for them to be returned in time for introduction in evidence; that the District Attorney General produced evidence before the jury to the effect that the spots on the jacket and curtains "looked like" or "appeared to be" blood stains, in spite of the FBI report that there were no blood stains; that the District Attorney General suppressed and concealed the positive proof that there was no blood on either the jacket or curtains; and that if the FBI report had been introduced into evidence, Mrs. Hilliard would have been acquitted at her first trial as she was at the second.

The complaint further contains these averments:

"22. That in the preparation of the case, the Defendant Williams advised or suggested or implied by some means that the witness Defendant Clark and perhaps others, should not mention anything about the first report of March 28, 1970, and that the Defendant Clark and other witnesses followed his instructions and answered both direct examination questions and cross-examination questions evasively, deliberately misleadingly, with half truths and in instances falsely, to carry out the complete suppression of the report of negative blood analysis of the items.

"23. That the Defendant Williams to carry out his intention of concealing and suppressing the report, contrary to any interpretation of good practice, and knowing that the defense expected the production of the jacket and report of the examination thereof for human blood, the Complainant insisting that there was no blood or if blood then animal blood, not human, announced that the State was ready for trial well knowing he was not going to offer the jacket or curtains or the report, and that once the trial had commenced, the Complainant's defense counsel could not obtain the jacket or any report in time to use it for defense evidence in the trial, and thus suppressing and concealing the evidence which would acquit the Complainant.

"24. That the Defendant Williams when the Complainant's defense counsel demanded the production of the

1. The other defendant is the Resident Agent of the Tennessee Bureau of Investigation, who filed an answer in the District Court. He is not a party on this appeal.

jacket, or a continuance until it could be produced, knowingly and deliberately advised the Court that through no fault of the State or prosecutors the jacket was not immediately available, as a witness had testified, when he knew or should have known by diligent inquiry that the same was in the T.B.I. office in Nashville, and would have required only two and one-half ($2\frac{1}{2}$) hours to be available, and he well knew that the jacket was deliberately sent off on such a late date that its return by trial date was impossible, and he knew of the materiality of the jacket and report and should have announced its unavailability before commencement of the trial, and by these actions suppressed and concealed the evidence of the jacket and report favorable to the Complainant.

"25. That the Defendant Williams knowingly procured and allowed witnesses such as the Defendant Donn Clark and perhaps others to mislead and deceive the Jury, Court, and criminal Defendant and her counsel, when he was aware of stronger evidence than that elicited from his witnesses, which was favorable to the criminal defendant, and failed and refused to reveal the favorable evidence and allowed the evidence he knew to be false to form the basis of the Complainant's conviction of murder in the second degree.

"26. That both Defendants continued to suppress and conceal the report from the complainant's defense counsel, after the trial was concluded, knowing that the same would constitute a basis for a new trial for the Complainant and only disclosed the report when compelled by the opinion of the Court of Criminal Appeals which required that they do so, then revealing the same for the first time the 20th day of April, 1971.

"27. That the Defendants and each of them, by the suppression and concealment, and by trickery, deceit, fraud, unethical practices and conduct for a public official, contrary to their oath of office and in violation of the Defendant's right to a fair trial and due process, were the direct and proximate cause of the Complainant being illegally and unlawfully confined in either the Carroll County Jail or the State Women's Prison in Nashville, and wrongfully deprived of her liberty and freedom, and further the direct and proximate cause of unbelievable mental pain and anguish as a result of being unlawfully and wrongfully imprisoned and branded forever as a convicted murderess, suffered day and night behind prison bars and of her earnings during the period of illegal confinement, which is not yet at an end, but which commenced May 12, 1970.

"28. That thereafter, beginning on the 12th day of May, 1971, the complainant was retried in the Circuit Court of Carroll County, Tennessee, on the charge of murder, the said retrial being concluded on May 13, 1971, by a jury verdict of not guilty.

"29. That the complainant and her counsel on that retrial had the use and benefit, knowledge, and probative evidentiary document and report dated March 26, 1970, from the F.B.I. Laboratory, to the effect that their scientific examination revealed no evidence of any blood, of any kind, human or animal, and in the said re-trial all material aspects of the proof were the same except as to the said report.

* * * * * *

"32. That the defendants individually, and jointly, by conspiring, combination, consort and agreement did conspire for the purpose of depriving either directly or indirectly, the complainant of the equal protection of the laws and of equal privileges and immunities under the laws; and under color of a state statute, ordinance, regulation, custom and usage of the State of Tennessee, caused the complainant to be subjected to the deprivation of her rights, privileges and immunities secured by the Constitution and laws of the United States, and while so doing were acting under color of state authority, and outside the scope of the jurisdiction of their respective offices, and without authority of law and that such actions were calculated or did, in fact, subject the complainant to a deprivation of her constitutional right to a fair trial and due process of law, and were the direct and proximate cause of the injuries, damages, wrongs and loss of liberty and freedom from May 13, 1970, to May 13, 1971, and as set out above."

[3] It is well settled that a prosecuting attorney, when acting in his official capacity, is immune from suit for damages, provided that his acts are within the scope of his jurisdiction and authorized by law. Peck v. Mitchell, 419 F.2d 575, 578 (6th Cir. 1970); Hurlburt v. Graham, 323 F.2d 723, 725 (6th Cir. 1963); Kenney v. Fox, 232 F.2d 288, 290 (6th Cir. 1956). See also Kauffman v. Moss, 420 F.2d 1270 (3rd Cir. 1970).

[4] However, the immunity of a prosecuting attorney from civil liability is not absolute:

> "[A] quasi-judicial officer, such as a prosecuting attorney, who acts outside the scope of his jurisdiction and without authorization of law, cannot shelter himself from liability by the plea that he is acting under color of office." Lewis v. Brautigam, 227 F.2d 124, 129 (5th Cir. 1955).

In McCray v. State of Maryland, 456 F.2d 1, 3 (4th Cir. 1972) the court said:

> "The immunity of quasi-judicial officers such as prosecuting attorneys and parole board members derives, not from their formal association with the judicial process, but from the fact that they exercise a discretion similar to that exercised by judges. Like judges, they require the insulation of absolute immunity to assure the courageous exercise of their discretionary duties. Where an official is not called upon to exercise judicial or quasi-judicial discretion, courts have properly refused to extend to him the protection of absolute judicial immunity, regardless of any apparent relationship of his role in the judicial system." (Footnotes omitted)

To like effect see: Madison v. Purdy, 410 F.2d 99, 101 (5th Cir. 1969); Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965). Cf. Lucarell v. McNair, 453 F.2d 836 (6th Cir. 1972); Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970); Manning v. Ketcham, 58 F.2d 948 (6th Cir. 1932).

See also the order of the Supreme Court denying application for mandamus and certiorari in Garrison v. Brown, 405 U.S. 985, 92 S.Ct. 1253, 31 L.Ed.2d 469 (1972), involving an action for civil damages against District Attorney Jim Garrison of New Orleans for his prosecution of Clay Shaw on the charge of conspiring to assassinate President John F. Kennedy.

The Code of Professional Responsibility adopted by the American Bar Association contains the following provisions with respect to the duties of a public prosecutor:

> "EC 7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused."
>
> "DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.
>
> "(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.
>
> "(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

[5] We hold that factual averments of the complaint as summarized above, considered in a light most favorable to plaintiff, charge the District Attorney General with acts which were outside his quasi-judicial capacity and beyond the scope of "duties constituting an integral part of the judicial process." We are not willing to extend the doctrine of quasi-judicial immunity to a complaint charging deliberate suppression of an FBI laboratory report establishing the innocence of the defendant.

Nothing in this opinion is intended to express any view as to the merits of the case. We do no more than hold that the District Judge erred in dismissing for failure to state a claim on which relief can be granted.

Reversed and remanded.

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UNITED STATES of America, Appellant,
v.
John P. CALANDRA, Appellee.
No. 71-1939.

United States Court of Appeals, Sixth Circuit.
July 27, 1972.

Proceeding, ancillary to a grand jury investigation, seeking suppression of certain evidence seized from place of business of a witness. The United States District Court for the Northern District of Ohio, Frank J. Battisti, Chief Judge, 332 F.Supp. 737, granted motion, and appeal was noted. Motion to dismiss appeal was denied, 455 F.2d 756. The Court of Appeals, William C. Miller, Circuit Judge, held that witness called before grand jury was a "person aggrieved" by alleged illegal search and seizure and, thus, had standing to move to suppress, notwithstanding that evidence would not be used against him in that he would be granted immunity.

Affirmed.

1. Searches and Seizures ⇐7(26)

Fourth Amendment claims may not be raised vicariously. U.S.C.A.Const. Amend. 4.

2. Searches and Seizures ⇐7(26)

Traditional principles of standing govern the matter of who may seek suppression of the "fruit" of an illegal search and seizure. U.S.C.A.Const. Amend. 4; Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.

3. Criminal Law ⇐394.6(1)

A motion to suppress by a target defendant is proper even where no prosecution is pending. U.S.C.A.Const. Amend. 4; Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.

4. Criminal Law ⇐394.6(1)

Source of a district court's jurisdiction to entertain a motion to suppress prior to indictment lies in the inherent disciplinary powers of the court. U.S.C.A.Const. Amend. 4; Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.

5. Criminal Law ⇐394.5(2)

It is the status of the individual as an "aggrieved person" at the time that he files a motion to suppress that is determinative of his or her recourse to such a motion and not the intention of the prosecution to file an indictment against the individual; fact that such an individual could not be harmed by the evidence, i. e. that he may be granted immunity, is irrelevant to any resolution of his standing to seek redress through a motion to suppress. U.S.C.A.Const. Amend. 4; Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.; 18 U.S.C.A. § 2514.

6. Criminal Law ⇐394.1(1), 394.6(1)
Searches and Seizures ⇐3

It is the right of the citizen to security from illicit intrusions on privacy that the exclusionary principle seeks to guarantee; additionally the return and suppression of the fruit of an illegal search serves to give partial redress to the one whose right to privacy has been violated. U.S.C.A.Const. Amend. 4; Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.

7. Criminal Law ⇐394.5(2)

Fact that one has been called as a witness before a grand jury does not curtail his recourse as a "person aggrieved" to a motion to suppress evidence, on ground of illegal search and seizure, pending the grand jury proceeding. U.S.C.A.Const. Amend. 4; Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.

8. Grand Jury ⇐23

The grand jury is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation.

9. Criminal Law ⇐394.6(1)

Purpose of suppression of the fruit of an unconstitutional infringement of privacy is to remove the incentive for such illicit activity. U.S.C.A.Const. Amend. 4.

10. Gaming ⇐60

Where only information in master affidavit pertaining directly or indirectly to tool company premises was observation that gambling suspect's automobile had been parked outside building on one occasion, observation that an automobile registered in company's names had been parked in front of suspect's residence and statement that an informant, described as having personal knowledge of suspect's bookmaking activity, had advised that owner of tool company would accept bets and lay off bets on sports events and was a close associate of suspect and used his home and office for bookmaking operation, warrant failed to establish probable cause to search tool company for gambling paraphernalia. U.S.C.A.Const. Amend. 4.

11. Gaming ⇐60

Under warrant authorizing search of place of business for bookmaking records and gambling paraphernalia, extensive four-hour search of business, which consisted of ground floor housing industrial machinery and inventory and second floor offices consisting of general office area and related facilities along with office of president and his secretary, and three-hour search of president's office meticulously examining virtually every document found therein was a general one far exceeding scope of the warrant and the permissible limits of the Fourth Amendment. U.S.C.A.Const. Amend. 4.

Shirley Baccus-Lobel, Roger A. Pauley, David Margolis, Robert D. Gary, Steven R. Olah, Attys., U. S. Dept. of Justice, Washington, D. C., Henry E. Petersen, Acting Asst. Atty. Gen., Crim.

cutor had knowledge of falsity of his witness's testimony or, if he did not have actual knowledge, had reason to believe that such testimony was false.

12. Criminal Law ⇐633(1)

Criminal trial is not a sporting event or a game of wits.

13. Criminal Law ⇐700

Prosecution need not prepare defendant's case.

14. Criminal Law ⇐700

Failure of defense counsel to conduct effective cross-examination, unless a deliberate trial tactic, cannot cure constitutional, prejudicial error committed by prosecution, although more diligent counsel might have cured error.

15. Criminal Law ⇐706

Public defender's failure to cross-examine state witness concerning points on which witness gave false testimony did not cure constitutional error in prosecution's use of testimony.

16. Habeas Corpus ⇐85.5(11)

Evidence in state prisoner's habeas corpus proceeding established that prosecution had suppressed a fingerprint.

17. Constitutional Law ⇐268(5)

Prosecution's suppression of evidence favorable to accused violates due process where evidence is material either as to guilt or punishment, irrespective of prosecution's good or bad faith.

18. Constitutional Law ⇐268(5)

Due process was violated by prosecution's suppression of third fingerprint on case found in coat said to be defendant's, even if prosecuting attorney was not aware of its existence, where state's expert testified that the first two prints were insufficient to exclude identification as defendant's, while it appeared that third print was not defendant's.

19. Criminal Law ⇐1165(1)

Federal harmless error test applicable to constitutional errors requires that in order to find error harmless, court must be able to declare it harmless beyond reasonable doubt.

20. Criminal Law ⇐1171(1)

State's failure to disclose to defendant evidence that coat, which prosecution claimed was defendant's, had been shown to defendant's fellow worker who stated that he had never seen defendant wearing such a coat, was not harmless error although coat was equally available to defendant.

21. Habeas Corpus ⇐45.3(1)

Habeas corpus court declined to consider merits of contentions as to which state defendant had failed to exhaust state remedies.

22. Courts ⇐365(3)

Although determinations of California Supreme Court in field of constitutional rights of accused have earned much respect and deserve great weight federal court cannot give state court's conclusions of law as to federal constitutional questions binding effect, but must draw independent conclusions of law.

23. Constitutional Law ⇐268(5, 8)

State defendant's right to due process of law was violated, and cumulative effect of errors was not harmless, where prosecution permitted witness to give material testimony which prosecution knew or should have known was false, suppressed an exculpatory fingerprint and failed to disclose negative evidence indicating that coat, which prosecution claimed was worn by defendant, was not defendant's.

21. Criminal Law ⇐633(1)

Right to fair trial may not be abrogated even if evidence of guilt is overwhelming.

Roger S. Hanson, Woodland Hills, Cal., for petitioner.

Thomas C. Lynch, Atty. Gen., Thomas S. Kerrigan, Deputy Atty. Gen., Los Angeles, Cal., for respondent.

FERGUSON, District Judge.

Petitioner, a California state prisoner, seeks a writ of habeas corpus under 28 U.S.C. § 2254, challenging the validity of

a judgment of conviction in two counts entered in the Superior Court in Los Angeles on August 10, 1961. The first count charged murder in the first degree, for which the jury fixed the penalty at death; in addition, petitioner was sentenced to a term of imprisonment not to exceed ten years on count two, assault with a deadly weapon with intent to commit murder. The judgment was affirmed by the California Supreme Court on automatic appeal [Calif.Pen.Code § 1239(b)]. People v. Imbler, 57 Cal.2d 711, 21 Cal.Rptr. 568, 371 P.2d 304 (1962). Thereafter, petitioner sought a writ of habeas corpus in the California Supreme Court. The writ was denied on the basis of a referee's findings following an evidentiary hearing. In re Imbler, 60 Cal.2d 554, 35 Cal.Rptr. 293, 387 P.2d 6 (1963), cert. denied, 379 U.S. 908, 85 S.Ct. 196, 13 L.Ed.2d 181 (1964).

Petitioner then filed a second petition for a writ of habeas corpus in the state courts challenging solely the penalty of death. During the penalty phase of petitioner's trial, the prosecution stated to the jury that life imprisonment, because of the possibility of parole, did not necessarily mean permanent incarceration. The trial court instructed the jury that it could consider the possibility of parole after seven years' imprisonment in determining the penalty. Holding these statements and instructions to be improper, the California Supreme Court reversed the judgment imposing the death penalty. In re Imbler, 61 Cal.2d 556, 35 Cal.Rptr. 293, 387 P.2d 6 (1964). On remand, petitioner was sentenced to life imprisonment on the murder count.

The federal petition was originally heard in the Eastern District of California. The District Court there denied the petition, holding it to be premature under McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1931), since petitioner was also serving concurrent sentences under independent convictions not then being challenged. The Court of Appeals for the Ninth Circuit reversed the denial following the United States Supreme Court's overruling of McNally v. Hill, *supra*, in Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968). Imbler v. Oliver, 397 F.2d 277 (9th Cir. 1968). Thereafter, the case was transferred to this District pursuant to 28 U.S.C. § 2241(d).

The petition for a writ of habeas corpus is conditionally granted for the reasons set forth herein.

I

[1] A federal evidentiary hearing on petitioner's claims was not held since the same contentions were presented in the writ of habeas corpus before the California Supreme Court. A referee appointed by that court conducted a full and adequate hearing, and since there is no major dispute as to the basic facts, this court need not conduct a further hearing. Townsend v. Sain, 372 U.S. 293, 318, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); Jackson v. California, 336 F.2d 521, 522 (9th Cir. 1964).

The complete reporters' transcripts of petitioner's trial and of the state habeas corpus hearing, as well as the referee's report thereon, are part of the record herein and have been fully considered by this court.

II

About 8:30 on the evening of January 4, 1961, two men entered a Los Angeles grocery store owned by Morris Hasson. Mr. Hasson was, at the time, kneeling behind the counter. His wife, then also in the store, approached the apparent customers; by that time, Mr. Hasson had risen with a peculiar look on his face by which, his wife testified, she knew something was wrong. When she started to question him, she observed a gun barrel protruding from the coat of one of the men. As she asked what the men wanted, the gun was fired, killing Mr. Hasson. The two men walked out of the store and headed in opposite directions, the gunman walking west.

Mrs. Hasson testified that the killer was wearing a hat and coat, and that she did not see his face and could not identi-

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fy him. She subsequently identified the accomplice as one Leonard Lingo.

There was no physical evidence whatsoever connecting petitioner with the crime. The most significant evidence was the testimony of one Alfred Costello, called by the prosecuting attorney the "People's principal witness".

Mr. Costello testified that about 8:30 in the evening involved he was directly across the street from the Hassons' grocery store when two men in the store, one wearing a dark coat and a "slouched down" hat, attracted his attention. Costello stated he heard a shot and, as he walked across the street, he attempted to intercept the killer who he then noticed was holding a gun. At this point he was eight to twelve feet from the man, who then made a right-hand turn heading west. Costello identified him as petitioner. Costello testified that he followed the killer about 25 feet into an alley. The killer started to run, losing his hat. He hesitated, then entered a parking lot. Costello then yelled, "Stop or I'll shoot". The killer turned and fired at Costello who, standing 15-20 feet away, heard the bullet pass him and strike against a building. The killer then ran through the parking lot and finally into a third parking lot, Costello still following. Near the attendant's office of that lot, the man discarded his coat, then doubled back through the alley and toward Hassons' store. Costello temporarily lost sight of him, then spotted him again going into a Y.M.C.A. building. Thereafter, Costello returned to the parking lot to recover the coat, and discovered the gun and a razor case in a pocket.

In addition, there was testimony from one Billy Hillen, who was leaving the Hassons' store as the killer and his accomplice were entering it. The men passed within four or five feet of Hillen. Hillen testified that petitioner was one of the men, wearing a brown overcoat and green hat, and that Lingo was the other. When he was about six or seven steps outside the store, Hillen heard a shot and turned back. He stated that petitioner was by that time standing outside of the store as Costello and a man named Fritz approached. Fritz said "jump him", but Hillen, who saw the gun, said to let him go.

The following day, Hillen recovered the hat worn by the killer.

Alonzo Dunlop, the third eyewitness, was an attendant in one of the parking lots through which the killer had run. Dunlop testified that he saw petitioner walk through his lot that night about 8:50 p. m. He said he heard no gunshots, although Costello stated the killer had fired at him in one of the adjacent parking lots. The only unusual sound he testified he did hear was the scream of Mrs. Hasson, and this only after the killer had left his lot. He further testified that he knew Costello by sight, but had not seen him in the lot that evening.

Ten days later, on January 14, 1961, petitioner, Leonard Lingo and one Jerry Mayes attempted an armed robbery of a service station in Pomona, California. Lingo died as the result of a traffic accident following the attempted robbery and Mayes was captured. Petitioner subsequently surrendered to the Pomona police.

Attempting to solve the Hasson murder case, the Los Angeles police showed Mrs. Hasson photographs of Lingo. She identified Lingo as the man who accompanied the murderer of her husband.

On January 30, 1961, prior to the trial, witnesses Costello, Hillen, Dunlop and Fritz were taken to a lineup. The lineup was conducted in four or five groups, with ten to twelve men in each group. When Hillen saw petitioner in the last group, he stated out loud, in the hearing of the other witnesses, "That's him". Hillen admitted making that statement, Dunlop testified as to it, and Costello also heard such a comment. Petitioner was then identified by the witnesses. Nevertheless, Hillen requested to see him wearing the hat and coat recovered from the vicinity of the murder. Several of the men were required to don the clothes, although there is some dispute as to

whether any of them were similar in build to petitioner, and Hillen again identified petitioner.

Petitioner's defense was an alibi. He testified that he and three other persons, along with his girl friend for part of the evening, visited about five drinking or dancing establishments, which he either named or described, from about 5:30 p. m. until after midnight on the day the murder occurred. He was able to identify fully only two of his companions: Jerry Mayes, who also testified about those activities although he found it difficult to be certain about the exact date, and one Robert Mahon. Also in the group were a man petitioner thought was named George, in whose car the group travelled from one place to another, and petitioner's girl friend, Ann, whose last name he could not recall.

In addition, while petitioner admitted to his participation in the Pomona robbery, he denied knowing Lingo before the 14th. He testified, as did Mayes, that the first time he and Mayes met Lingo was in the early morning of the 14th, the introductions having been made by a man named Dale who was not located at the time of trial.

Subsequent to the trial, investigation produced further corroboration by new witnesses both of petitioner's alibi and of his statement with regard to his first meeting with Lingo on January 14, ten days after the murder. The prosecution made these facts known to the Governor's office and the California Adult Authority (the state parole board), stating that "investigation has revealed a consistency in Imbler's position which is now corroborated by others". The man named Dale, who introduced petitioner and Lingo on January 14, had been found, and the owner of the car in which the drinking rounds were made on January 4th, whom petitioner thought was named "George", was also located and corroborated the alibi.

III.

Petitioner alleges that prejudicial error occurred during testimony of the witness Costello primarily, but not exclusively, involving that witness' credibility.

One instance of such error is claimed to be in the following testimony:

"Q [By defense counsel] * * * Did you see any mug shots, as they are called, or small pictures of the defendant that you remember—Mr. Imbler—before you went to a line up?

"A [By Costello] No.

"Q Did the officers bring you out and show you a number of pictures?

"A Well, I looked through the mug books, which is customary, I think.

"Q You did look through a mug book?

"A Yes.

"Q You saw a number of pictures then of different people as possible suspects?

"A Yes.

"Q And among them were you able to find anybody that caused you to think this might be the person among the mug shots?

"A Yes, but I kept that to myself. I didn't reveal it at that time.

"Q Did you see any mug shots of the defendant particularly?

"A I believe I did."

Thus, in Costello's testimony there appears a possible contradiction as to whether he saw pictures of petitioner prior to the lineup. However, it is possible to interpret the testimony, and the jury may well have so interpreted it, as meaning that Costello did not see any mug shots of petitioner before the lineup, and was shown the "mug book" only after the lineup had already taken place. In fact, both Costello and Hillen were shown photographs of petitioner on January 25, 1961, five days prior to the lineup. Such pictures were not part of a "mug book", but were shown along with some twelve or so other pictures. At that time, on January 25th, Costello did not keep his identification to himself; rather, both he and Hillen identified Imbler as a "good possible suspect". There-

fore, to the extent that Costello answered that he had not been shown pictures of Imbler, or at least did not see them apart from any "mug books", he was not telling the truth. At least one of the police officers involved in the investigation, who knew of petitioner's pictures being shown to the witnesses, was always present in the courtroom during the trial; yet no attempt was made to correct this inaccuracy. Although this court cannot conclude that Costello willfully perjured himself on this issue, it is clear that his answer was false and that the state, having knowledge of such falsity, permitted it to stand.

The witness Hillen similarly testified:

"Q [By defense counsel] * * * Did the officers show you at any time some small pictures of different men to see if you could pick out a man from some pictures?

"A [By Hillen] I looked at the mug books. That's standard procedure."

Again:

"Q * * * [D]id you ever see any pictures of the defendant, if you remember?

"A Not that I remember."

As indicated above, this answer was also false, and the state had knowledge of such falsity.

Further false testimony was given by Costello on matters relating to attempted impeachment of his testimony. In the following testimony on redirect examination, the prosecutor led Costello to testify concerning a previous "voluntary commitment" to a state mental hospital, when in fact the commitment had been mandatory upon a court adjudication of insanity:

"Q [By District Attorney] Did you voluntarily commit yourself in 1946 to any of these state hospitals?

"A [By Costello] Yes, I did.

"Q And what were the circumstances of your voluntarily committing yourself?

"A Well, in '46 and '47 when I was committed to Mendocino, I got in a little trouble with the law and I was represented by the Public Defender's Office at that time, and it was suggested to me that I enter a plea of not reasonably—not guilty by reason of insanity, and I was furnished a copy with the right answers to give the doctors at that time, which caused me to be committed to Mendocino."

Costello denied on the stand that he had been adjudicated insane, although both the prosecutor and defense counsel knew the denial to be false from a "make sheet" each had in his possession. The denial, however, was stricken in order to allow the court to hear legal argument on the propriety of the inquiry. When Costello was subsequently asked if he knew, of his own knowledge, whether the commitment was based upon a finding of insanity, the prosecution's objection was sustained and the witness was not permitted to answer. The jury had already, however, heard Costello's denial, albeit subsequently stricken.

Thus the prosecutor, by leading the witness in regard to a *voluntary* commitment, not only introduced erroneous testimony, but also succeeded in preventing the truth from being introduced.

At the state habeas corpus hearing the prosecuting attorney testified that, so far as he could remember, he did not see the "make sheet" on Costello prior to trial. Just before Costello had taken the stand, the prosecutor had a short conversation with him, at which time Costello told him of a 1951 felony conviction; he did not at that time say anything about hospital commitments. The prosecutor further testified that when he saw the "make sheet" for the first time the public defender showed it to him. Before cross-examination of the witness. After seeing the "make sheet", he talked with Costello, confronting him with the new facts. Costello then admitted to various mental hospitalizations, but told the prosecuting attorney that the 1946 admission was a voluntary commitment because he [Costello] had

tarily pleaded innocent by reason of insanity knowing that the result would be hospitalization. Having had before him the "make sheet" that stated that Costello had been "found insane now and at time of crime committed to Mendocino", the prosecutor testified about the discussion with the witness:

"Mr. Costello told me that he was voluntarily committed. He gave me the reasons why he thought it was a voluntary commitment. Rather than argue with him, I just accepted his own wording by his statement that he pleaded not guilty to—by reason of insanity and was furnished certain answers by the Public Defender. In his mind, he thought it was a voluntary commitment. I wasn't going to argue with him. Let him explain it to the jury. The jury could make the decision. That was my attitude."

It therefore appears that the prosecutor in fact knew the commitment had not been voluntary, but, in deference to the witness, he not only refrained from using the term involuntary, but used the opposite and clearly erroneous term. Thus, whether he intended to do so or not, the prosecuting attorney knowingly created an incorrect impression of the most critical aspect of the commitment.

In addition, during cross-examination defense counsel attempted to elicit testimony of Costello's criminal record.

"Q [By defense counsel] Mr. Costello, have you ever been convicted of a felony?

"A [By Costello] Yes, I have. I am glad you asked that question.

"Q And that was in 1951, was it?

"A That's right.

"Q And another one in 1955, is that true?

"A No. You are wrong.

"Q Just one felony conviction, 1951?

"A That's right."

The "make sheet" which the prosecutor saw prior to the cross-examination indicated at least one other felony conviction to which defense counsel referred in the above testimony, and possibly others. However, on redirect examination, rather than correcting the false statement, the prosecutor perpetuated it:

"Q [By prosecutor] Now, you said that you were convicted of a felony in 1951. What felony was that?

"A [By Costello] Forgery."

The prosecutor admitted in the state hearing that he did not pursue, in his conversation with Costello prior to redirect examination, the leads suggested by the "make sheet". Thus, while the "make sheet" alone suggested that Costello might be a six-time felon, the prosecution "believed" Costello's statement that he was convicted only once. In summary, Costello's testimony concerning his felony convictions was false, and the prosecutor had information that it was false yet declined to introduce the truth.

On redirect examination of Costello, in an attempt to rehabilitate the witness, the prosecution elicited the following testimony, having previously been advised by Costello of it:

"Q [By prosecutor] Now, then after your release from any of these hospitals, did you attend any universities or schools?

"A [By Costello] Yes, I did. I completed two years of my university training—a four year course in two years—and received a degree from the University of California.

"Q And what type of degree was that?

"A Industrial relations, and later on I went to night school at SC, and received an Engineer's degree.

"Q When was it that you received the Engineer's degree?

"A '54."

Costello further testified that his earnings for the past four years had "averaged around nine to ten thousand a year".

Such testimony was admittedly false. The prosecutor, however, at the state habeas corpus hearing, testified that, at

the time of the trial, he did not know it to be false, and, having just been advised by Costello of that information during a recess, did not have sufficient time to verify it.

Petitioner contends that the prosecution *must* have known that this testimony, which it elicited, was false. He further argues that only through gross negligence could the prosecutor have failed to conclude that the testimony was perjured. If in fact the prosecutor did fail to draw that conclusion, petitioner argues that the state should nevertheless be charged with it. It is clear that the state had knowledge during the trial of the following facts about Costello:

1. That Costello had at least three previous convictions;

2. that in addition to his convictions he had been arrested on forgery and bad check charges on numerous occasions;

3. that he was committed to Mendocino State Mental Hospital on an adjudication of insanity in March, 1946;

4. that he was recommitted to Mendocino State Mental Hospital in February or March, 1949;

5. that he spent time in Camarillo State Mental Hospital in 1947 or 1948;

6. that at the time of trial there was a charge pending against him in Highland Park, California, for passing a bad check;

7. that at the time of trial there were outstanding checks to Mrs. Hasson and to the hotel at which he was staying for which there were either insufficient funds or no bank account; and

8. that he was in prison under 1951 conviction until November, 1953, although testifying that by 1954, one year after he was released from prison, he had received two degrees from two universities.

With actual knowledge of these facts, or at least having them directly before him, the prosecutor elicited from Costello the testimony that the witness received a university degree in industrial relations, completing a four-year degr in one-half the normal time, and a s ond full degree in engineering, a tota new and different academic subject, a university night school within a ye after his release from prison.

In addition, Costello was allowed testify that for the past four years h earnings averaged nine to ten thousa dollars a year, when in fact the prose tion knew that Costello had recently wr ten bad checks for relatively sm amounts, of which some were still o standing and one of which was the ba of a pending criminal proceeding.

The police learned of these facts d ing their investigation of the ca Moreover, aside from their knowledge communication thereof to the prosec ing attorney, the existence of the pend charge was also independently known the prosecuting attorney. During a cess of the trial, he talked to two po officers from Highland Park who s they wanted to speak with Costello ab the charge, and he asked them to w until Costello was finished with his t timony. The prosecutor's final atte at rehabilitation came just three qu tions after he referred to the witn single admitted prior conviction (though the prosecution knew there h been more than one conviction):

"Q [By prosecutor] Incidenta since you have been in trouble w the law have you been trying straighten yourself out?

"A [By Costello] Very much

This testimony was elicited despite fact that the prosecutor knew of pending Highland Park charge, had session of Costello's "make sheet" wh indicated at least two subsequent fenses and a subsequent charge of pa violation, and had available knowledg or actually knew of the other curre outstanding bad checks.

[2] It is clearly established tha criminal conviction obtained through prosecution's knowing use of perj or false evidence violates the defend right to due process of law as prote

the Fourteenth Amendment to the federal constitution. Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935). See also, *e. g.*, Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); Hysler v. Florida, 315 U.S. 411, 62 S.Ct. 674, 86 L.Ed. 932 (1942); Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942); Evans v. Eyman, 363 F.2d 540, 542 (9th Cir. 1966).

There is no doubt that false testimony was given at petitioner's trial by Costello in the following respects: as to whether Costello

(1) saw petitioner's mug shots prior to the lineup,

(2) was voluntarily or involuntarily committed to Mendocino State Mental Hospital in 1946,

(3) had previously been convicted of more than one felony,

(4) attended any universities or obtained any degrees therefrom subsequent to his release from the mental hospitals and from prison,

(5) earned an average of $10,000 a year for the four years preceding the trial, and

(6) had been trying to "straighten" himself out since he had been "in trouble with the law".

Further false testimony was given with respect to the mug shots from the witness Hillen.

[3, 4] In order, however, for such false testimony to warrant the relief here sought, it must have been material to the case. The court finds that the six enumerated items of false testimony were in fact material. The first item, relating to Costello's seeing petitioner's picture prior to the lineup, was material to the vital issue of identification. Each of the other items was material to the witness' credibility. It is no longer open to question that such materiality is within the constitutional rule set forth above. The Supreme Court conclusively settled that issue in Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959):

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence * * *."

The Court there cited with approval the following passage from People v. Savvides, 1 N.Y.2d 554, 557, 154 N.Y.S.2d 885, 887, 136 N.E.2d 853, 854-855:

> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."

See also, Giles v. Maryland, supra 386 U.S. at 74, 87 S.Ct. 793, and Loraine v. United States, 396 F.2d 335 (9th Cir.), cert denied, 393 U.S. 933, 89 S.Ct. 292, 21 L.Ed.2d 270 (1968). The Court of Appeals in this Circuit has stated:

> "Evidence available for use at the trial may be material within the meaning of this rule, even though it goes only to the credibility of a witness."

Loraine v. United States, supra at 339.

Cases granting relief for failure to make disclosure of evidence or for use of false evidence relating only to credibility are numerous. For example, in Powell v. Wiman, 287 F.2d 275 (5th Cir. 1961), the prosecution successfully objected to the introduction of any evidence of its key witness' mental condition, although it knew the witness had previously been in mental hospitals; that fact was not known to the defense. Such conduct was held to be a violation of the prosecution's duty. In Ingram v. Peyton, 367 F.2d 933

(4th Cir. 1966), the court held that the prosecution's apparently unintentional misnaming of its chief witness denied petitioner of a fair trial since it prevented his attorney from discovering the witness' prior criminal record, a matter relating solely to credibility.

See also, United States ex rel. Hill v. Deegan, 268 F.Supp. 580 (S.D.N.Y.1967), where the key prosecution witness was presented as an honorably discharged veteran who, in addition, was receiving pension as a wounded veteran. This portrait of a good citizen tended to minimize the rather substantial variations that occurred in the witness' testimony. Although at the time the prosecution did not know those facts were false, the court found that the prosecution already had reason to be wary of the witness' testimony. In addition, the prosecution had knowingly allowed certain additional false testimony to be given, which it allowed to stand until the witness himself corrected it. The *Deegan* case is similar to the one here in that the witness was permitted to create for himself a respectable, albeit false, background. Judge Frankel, in granting the petition for a writ of habeas corpus, remarked of the witness, "His gratuitous injection of these unchecked lies adds to the blemishes in an already infected record". 268 F.Supp. at 591. The same may be said in this case. Costello's testimony of his two degrees, his engineering position, and his $10,000 a year job was bound to have some effect in mitigating his less admirable, but factual, past history of which the jury was partially apprised. Thus, although only the witness' credibility was involved (except as to the mug shots), it was in this case extremely significant. It must be remembered that no physical connection between petitioner and the crime was ever established, causing the convictions to rest solely upon witnesses' identification of petitioner.

[5] It is, therefore, readily apparent that the evidence here involved was material within the meaning of the rule. The California Supreme Court also concluded, for example, that Costello's testimony of his college education was material, although the state referee had concluded otherwise. That court stated that on the question of perjury the test of materiality is whether the perjured testimony "could have probably influenced" the trier of facts. The court concluded that, "This testimony 'could have probably influenced' the jury to consider Costello rehabilitated after his capacity and competence as a witness had been put into question on cross-examination". In re Imbler, 60 Cal.2d 554, 564-565 n. 2, 35 Cal.Rptr. 293, 298, 387 P.2d 6, 11 (1963). This test of materiality is consistent with the general law as recognized by the federal courts; that is, whether the false testimony is capable of influencing the trier of facts. See, *e. g.*, Luna v. Beto, 395 F. 2d 35, 38 (5th Cir. 1968); United States v. Parker, 244 F.2d 943, 950-951 (7th Cir. 1957), cert. denied, 355 U.S. 836, 78 S.Ct. 61, 2 L.Ed.2d 48 (1957); Blackman v. United States, 108 F.2d 572 (5th Cir. 1940).

Respondent argues that another element of this rule also prevents its application to the instant case: knowledge of the falsity of such evidence on the part of the prosecution. Respondent does not seriously dispute the falsity of Costello's statements. Instead, it is argued that the prosecution, in effect, acted in good faith and without knowledge that such testimony was false. Lacking such knowledge, the state contends it cannot be responsible for any perjured testimony. This court does not agree.

It should be noted at this point that while it is true that the Supreme Court cases have as yet discussed only the "knowing" use of perjured testimony, there is authority for the proposition that one convicted on the basis of perjured testimony has been deprived of due process even when the prosecution was unaware of the perjury. In Jones v. Kentucky, 97 F.2d 335 (6th Cir. 1938), it was held that a state is constitutionally required to provide a corrective remedy upon discovery of the

perjury, and, absent such a remedy, federal habeas relief will be granted. There the state courts had held they lacked jurisdiction to grant the relief sought. The prosecutor did not know at the time of the trial that the testimony was false, and there was no suggestion that he should have known. Nevertheless, the United States Court of Appeals granted relief. See also, Smith v. Warden, Maryland Penitentiary, 254 F.Supp. 805 (D. Md. 1966); United States ex rel. Montgomery v. Ragen, 86 F.Supp. 382, 390 (N. D.Ill.1949).

The position that a criminal conviction founded in part upon perjured testimony cannot be constitutionally permitted to stand, whether such perjury is discovered prior or subsequent to trial, is therefore not without authority. The prejudice resulting to a defendant so convicted is not eliminated by the state's ignorance. Nor can it seriously be contended that there is absent any "state action", necessary to invoke the Fourteenth Amendment's protection, in the procuring of a state criminal conviction.

It should also be noted that the Supreme Court has, in its supervisory capacity over the federal courts, held that a new trial is required when it is discovered subsequent to trial that a key government witness in a federal criminal case was not reliable. Mesarosh v. United States, 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed. 2d 1 (1956). The motion in that case had been made by the government. The Court recognized that ordinarily a defense motion for a new trial alleging new evidence which is "merely cumulative or impeaching" will not afford defendant a new trial. But in that case, as here, the witness' unreliability is conceded by all parties, and it is not a case of mere cumulative evidence. The Court, in *Mesarosh*, stated:

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial.
>
> "The government of a strong and free nation does not need convictions based upon such testimony. * * * The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial." [352 U.S. at 9, 14, 77 S.Ct. at 5, 8.]

This rule has been applied in the case of a collateral attack upon a federal conviction (via 28 U.S.C. § 2255 motion), Mitchell v. United States, 368 U.S. 439, 82 S.Ct. 402, 7 L.Ed.2d 429 (1962) (per curiam), and the California Supreme Court has been urged to adopt it by at least one justice of that court. People v. Riser, 47 Cal.2d 566, 592, 305 P.2d 1 (1956) (Carter, J., dissenting), cert. denied, 353 U.S. 930, 77 S.Ct. 721, 1 L.Ed.2d 724 (1957), appeal dismissed, 358 U.S. 646, 79 S.Ct. 537, 3 L.Ed.2d 568 (1959).

It is, however, under *Mesarosh*, still a rule applied only in the Supreme Court's supervisory capacity over federal trials, and despite the Court's statement that "there can be no other just result than to accord petitioners a new trial", the Court has not yet held that a different result would not comport with due process.

[6] Thus, the current law in this Circuit, contrary to the holding in Jones v. Kentucky, 97 F.2d 335 (6th Cir. 1938), is that "knowledge" by the prosecution is required to support a claim of denial of due process based upon the existence of prejudicial perjured testimony in a criminal trial. Marcella v. United States, 344 F.2d 876, 880 (9th Cir. 1965), cert. denied, 382 U.S. 1016, 86 S.Ct. 630, 15 L.Ed.2d 531 (1966); Black v. United States, 269 F.2d 38, 43 (9th Cir. 1959), cert. denied, 361 U.S. 938, 80 S.Ct. 379, 4 L.Ed.2d 357 (1960); Taylor v. United States, 221 F.2d 228 (9th Cir. 1955). This court need not consider the propriety of a departure from that rule since it finds the facts in this case to fall within it.

BEST COPY AVAILABLE

As set forth above, Costello's testimony was materially false in at least six respects. As to his false statement that he was "voluntarily" committed to a certain state hospital in 1946, when in fact he was committed because he had been adjudicated insane, this court finds that the prosecuting attorney had actual and definite knowledge that such statement was false. He not only permitted that statement to stand, an act itself expressly prohibited by Napue v. Illinois, 360 U. S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), but he purposely and intentionally led the witness to make it. Twice in his questioning, the prosecutor himself referred to the commitment as "voluntary", although his testimony at the hearing establishes that he indeed knew better. His justification for using that terminology, to be consistent with the witness' understanding of the situation, finds no basis in the law. Where a prosecutor knowingly permits false evidence to be introduced in a trial, and such evidence will inevitably create a false impression in the minds of the jury, no legal justification for that misrepresentation can exist. If the prosecutor wished to avoid for the sake of convenience the term "involuntary", he could have readily done so; there was absolutely no necessity for a substitute adjective, and use of an erroneous one was highly improper. The prosecutor also stated that he intended to let the jury "decide" with respect to the voluntariness of the commitment, having presented to them the "facts". The one fact, however, which he had, and which the jury did not, was that the commitment was not voluntary.

[7] Nor can it be said that there was at least some question about the nature of the commitment, and that the jury, having the "facts", was competent to judge the issue. It is not only affirmative misrepresentations which the prosecutor is prohibited from employing to secure a conviction; omissions and half-truths are equally damaging and prohibited, and their use is no less culpable. Jackson v. Wainwright, 390 F.2d 288, 293 (5th Cir. 1968). Creating an inference that a fact exists when in fact to the knowledge of the prosecution it does not, constitutes the knowing use of false testimony. *E.g.*, Turner v. Ward, 321 F.2d 918, 920-921 (10th Cir. 1963).

"Evidence may be false either because it is perjured, or, though not itself factually inaccurate, because it creates a false impression of facts which are known not to be true." Hamric v. Bailey, 386 F.2d 390, 394 (4th Cir. 1967). The court, in *Hamric*, recognized that the witnesses giving false testimony may have innocently done so through a lack of perception. Nevertheless, the state knew such testimony to be false, and failed to bring the true facts to the jury's attention. The conviction was held to violate the Fourteenth Amendment.

[8] The prosecution here also had knowledge of the fact that both Hillen and Costello had seen pictures of petitioner prior to the lineup. Such knowledge is conclusively indicated by the police log. One of the investigating police officers was present at the trial. Even assuming that the prosecuting attorney himself did not have such knowledge, the application of the rule is not precluded, for the prosecution is charged with the knowledge of its agents including the police. This principle is no longer subject to serious dispute. As it was held in Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842, 846 (4th Cir. 1964):

> "Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor."

The court there held that if the police failed to make proper disclosure, they were participating in the deception. Unlike the situation in Luna v. Beto, 395 F.2d 35, 40 (5th Cir. 1968), which distinguished its facts from those in *Barbee*, an investigating police officer in the case here was present in the courtroom, and was able to hear the testimony given.

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He could easily have corrected any misstatements of fact, or have brought the same to the prosecutor's attention. His action is no less that of the state than the actions of a prosecuting attorney. The contention that knowledge of perjured testimony must in fact be "brought home to the prosecuting officers" was expressly rejected in Curran v. Delaware, 259 F.2d 707, 712-713 (3d Cir. 1958), cert. denied, 358 U.S. 948, 79 S.Ct. 355, 3 L.Ed.2d 353 (1959), the court resting its decision upon Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). It is clear that the term "prosecution", for this purpose, includes at least the investigating officers as well as the attorneys. See also United States v. Consolidated Laundries Corp., 291 F. 2d 563, 570 (2d Cir. 1961), where even the conduct of government clerks was held to result in denial of due process; Estes v. United States, 254 F.Supp. 314, 318 (W.D.Tex.1966).

The fact that Costello had been convicted of more than one felony was also known to the prosecuting attorney. He admittedly examined the witness' "make sheet", which indicated *at least* two others. At the state hearing the prosecutor somewhat evasively testified that he had examined the "make sheet", but stated he had looked at it "as a whole", and not to its specific parts. Respondent cannot deny knowledge of facts which it had before it and which its agent admittedly examined. That the agent may have ignored those facts does not relieve the state of its responsibility. This is not mere negligence in failing to ascertain the facts. It is, at best, deliberate failure to take full notice of their significance. Thus, this case is vastly different from Taylor v. United States, 229 F.2d 826 (8th Cir.), cert. denied, 351 U.S. 986, 76 S.Ct. 1055, 100 L.Ed. 1500 (1956), in which petitioner attempted to charge the prosecution with "implied" knowledge of the contents of certain Narcotics Bureau records which allegedly would have refuted what a witness told Narcotics Agents. Here, petitioner need not rely on the mere existence of official records. The facts with which respondent is charged were either in fact known to the prosecuting attorney, the investigating officers, or were contained in documents which the prosecutor had actually examined.

By virtue of the same principles, the prosecution had not been attempting to "straighten out". Therefore, by asking Costello whether he had been so doing, the prosecutor knowingly attempted to create an impression in the minds of the jurors which he knew was false. For example, as discussed above, the prosecutor personally knew of the pending bad check charge against Costello. In addition, he had examined the witness' "make sheet" which indicated, among other things, two offenses and a parole violation in the period of time involved, and the police officer (who had been present at the trial) knew of additional bad checks issued by Costello that were still outstanding.

The final items of Costello's false testimony are the references to the witness' two alleged university degrees and his claimed annual income. This court has above described the facts known by the prosecutor about Costello. For a man with a history of felony convictions and state mental hospital commitments, such a success story is highly suspect, particularly when coupled with the known fact that Costello had been in prison until November of 1953, and yet he claimed to have received his second degree, through night school, at a university in 1954. This rather incredible story was given in full to the jury as the result of leading questions by the prosecutor.

[9] While the prosecutor claimed not to have disbelieved these outright lies, he clearly had cause to suspect them. The reckless use of highly suspicious false testimony is no less damaging or culpable than the knowing use of false testimony, and a conviction based upon

such evidence must suffer the same consequence.

Although there are no cases directly holding that testimony which should have been known to be false falls within the prohibition against the knowing use of perjured evidence, a number of cases have directed their inquires based upon that principle. Thus, for example, in McCloskey v. Boslow, 349 F.2d 119, 121 (4th Cir. 1965), it was held that the allegation that the prosecuting attorney should have known that certain testimony was perjured raises factual issues and "legal questions concerning the state's responsibility for the accuracy of what Dr. Boslow said". Again, in Wild v. Oklahoma, 187 F.2d 409, 410 (10th Cir. 1951), the court recognized this principle in finding that:

> "In the case before us there is no suggestion that the prosecuting officers knew or had reason to believe that any of the testimony offered at the trial of the petitioner was false or perjured."

See also Smith v. Warden, Maryland Penitentiary, 254 F.Supp. 805 (D.Md. 1966).

Moreover, in cases where evidence favorable or helpful to the defense has been withheld, due process has consistently been held to be violated even if the evidence is only negligently withheld. That rule was stated in Thomas v. United States, 343 F.2d 49, 53–54 (9th Cir. 1965):

> "The well-recognized rule thus invoked is that a conviction cannot stand where a prosecutor has, either wilfully or negligently, withheld material evidence favorable to the defendant. As the Second Circuit said [in United States v. Zborowski, 271 F.2d 661, 668 (2d Cir. 1959)]:
>
> "'The prosecutor must be vigilant to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried.'"

See also, *e.g.*, Ingram v. Peyton, 367 F.2d 933 (4th Cir. 1966); Levin v. Katzenback, 124 U.S.App.D.C. 158, 363 F.2d 287 (1966); Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964); United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir. 1961); United States v. Birrell, 276 F.Supp. 798, 817–818 (S.D.N.Y. 1967); United States v. Sobleh, 203 F. Supp. 542 (S.D.N.Y.1961), aff'd, 301 F. 2d 236 (2d Cir.), cert. denied, 370 U.S. 944, 82 S.Ct. 1585, 8 L.Ed.2d 810 (1962); United States v. Heath, 147 F.Supp. 877 (D.Hawaii 1957), appeal dismissed, 260 F.2d 623 (9th Cir. 1958) (approving the district court's holding) (the *Birrell* and *Heath* cases involving apparently inadvertent loss of certain documents).

It would hardly be logical, in light of those cases, to hold a prosecutor to a lower degree of diligence with respect to the introduction of false evidence.

[10] Nevertheless this court need not now decide whether mere negligence in allowing this false testimony to be given would warrant the relief here sought. In this case, more than mere negligence has been established. The prosecutor either had reason to believe or in fact knew that each item of evidence discussed above was untrue. The state cannot now disclaim knowledge of such falsity on the ground that its agent, the prosecutor, ignored the facts before him or that the investigating officers failed to disclose those facts to him. Due process of law does not tolerate a prosecutor's selective inattention to such significant facts. It requires that he exercise good faith in prosecuting that case. Such good faith is not fulfilled where the prosecutor allows his witness to give false testimony of which he has advance knowledge and the accuracy of which he has reason to suspect. The duty of good faith is not merely a negative one, to omit from one's case evidence that lies. It imposes as well an affirmative duty to

avoid even unintentional deception and misrepresentation, and in fulfilling that duty the prosecutor must undertake careful study of his case and exercise diligence in its preparation, particularly where he is confronted with facts tending to cast doubt upon his witness' testimony. The prosecutor's objective is justice; his role is not that of a mere advocate. The goal of justice is hardly satisfied by less.

[11] Therefore, as to each of the six items of false testimony described above, the court finds that the prosecutor had knowledge of such falsity, or, if he did not have actual knowledge, that he had reason to believe such testimony was false and his reckless use thereof in disregard of such reason is to be treated the same as knowing use of false testimony.

IV

[12] Respondent's position is that any errors allegedly committed by the prosecution could have been cured by action of defense counsel. Thus, it is argued that if Costello's testimony, for example, of his university education was suspect, defense counsel should have cross-examined the witness on that issue. It is clear that defendant's public defender should have done so. Nevertheless, his failure to do so will not bar relief. A criminal trial is not a sporting event nor a game of wits. See, *e.g.*, Giles v. Maryland, 386 U.S. 66, 100, 87 S. Ct. 793, 810, 17 L.Ed.2d 737 (1967) (Fortas, J., concurring):

> "A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim."

See also Levin v. Katzenback, 124 U.S. App.D.C. 158, 363 F.2d 287, 291 (1966); Curran v. Delaware, 259 F.2d 707, 711 (3d Cir. 1958), cert. denied, 358 U.S. 948, 79 S.Ct. 355, 3 L.Ed.2d 353 (1959).

[13–15] It is true, as respondent urges, that the prosecution is not required to prepare defendant's case. See United States v. Gleason, 265 F.Supp. 880, 884 (S.D.N.Y.1967). Nevertheless, the failure of defense counsel to conduct an effective cross-examination, unless a deliberate trial tactic, cannot cure constitutional, prejudicial error committed by the prosecution. The fact that a more diligent counsel might have cured that error does not negate it. See Levin v. Katzenback, 124 U.S.App.D.C. 158, 363 F.2d 287, 291 (1966). See also the concurring opinion of Justice White in Giles v. Maryland, 386 U.S. 66, 82, 87 S.Ct. 793, 801 (1967), wherein he noted that, "Had petitioner's counsel been *less* diligent, the false testimony might rise to the level of a *Napue* violation" (emphasis added). This is not a case such as United States v. Sobell, 142 F.Supp. 515 (S.D.N.Y.1956), aff'd, 244 F.2d 520 (2d Cir.), cert. denied, 355 U.S. 873, 78 S. Ct. 120, 2 L.Ed.2d 77 (1957), where it may be said that defense counsel's failure to cross-examine a witness with respect to a particular issue was a matter of specific and deliberate strategy for which defendant, upon hindsight, cannot now complain.

V

Petitioner further contends that the prosecution suppressed certain exculpatory fingerprint evidence contained on a razor case. The case was found in the coat discarded by the killer. At the trial, a police fingerprint expert testified that he found two fragmentary prints on the case, but that they were not sufficient to permit a comparison with any other prints. He stated that there was more than one point of identification in each fragment "constituting possibly three or four points", but that at least ten points are needed for an identification. In addition, he agreed with the prosecutor's statement that if he did have a fingerprint exemplar, it would not have done "any good" because he didn't have a sufficient fragment.

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After the trial, an expert working on petitioner's behalf discovered a *third* fingerprint on the razor case. The third print was positively identifiable and is admitted not to be petitioner's. All the evidence indicates that this print was in fact on the case at the time of trial.

At the state habeas corpus hearing, the police fingerprint expert was reluctant to admit to the existence of the third print. He first testified that, as he "recalled", there were two fingerprints on the razor case. Upon viewing the case, however, he added, "In my testimony a moment ago I said that there were two. I see that there are three, actually." When asked whether the third print could be identified, he stated that he didn't "believe so". He further testified, after viewing an unmagnified photograph of the print, that he was unable to say whether or not the print was petitioner's. Exemplars of petitioner's prints were then given to him during noon recess at which time he compared them with a *magnified* photo of the third print. His testimony about that second examination was somewhat evasive:

"Q [By petitioner's counsel] [D]id I show you at noon the prints of Mr. Imbler that were made by Mr. Meyers, I believe it was, the other day?

"A [By police fingerprint expert] Yes, I glanced at them.

"Q Did you look at them and compare them with the photograph of the print appearing on the inside of the razor case?

"A No. I didn't make an accurate comparison.

"Q Did you make enough of an examination to draw a conclusion as to whether or not the magnified photograph is one of the prints appearing on the exhibits that were prepared by Mr. Meyers?

"A I would say that they weren't.

"Q Well, did you make enough of an examination to form an opinion, then?

"A That is a more or less casual opinion. As I say, I didn't compare it with a magnifying glass, but I would say that they weren't, generally."

Thus, while the state's expert was unable to make a definite statement with regard to the unmagnified pictures, he was able to conclude, albeit reluctantly, that the print as it appeared in the magnified photo was not petitioner's. After later examining the prints during an overnight recess, he finally made a clear and unqualified statement that the third latent print was not petitioner's.

His testimony raises an additional problem. He stated that the first two latent prints were too fragmentary to be of "any good", even if compared with exemplars. Nevertheless, he did in fact make such comparisons, as admitted in his testimony and shown by police logs of the investigation.

Thus, the function apparently served by fingerprint testimony was to imply to the jury that the prints on the razor case *might* have been petitioner's. Had the jury known that the third print on the case was not petitioner's, they clearly would have reached a different conclusion with respect to this evidence.

[16, 17] The court finds that evidence of the third fingerprint was suppressed. The referee at the state hearing found, however, that such evidence was equally available to defendant at the trial. The California Supreme Court adopted that conclusion, stating in addition that although in some cases the negligence of one of the state's representatives may result in a denial of a fair trial, in this case it did not. The court stated that "[the police investigators'] negligence has obstructed the defendant in challenging the case against him, it is not a ground for collateral attack", and added that the razor case had been available to petitioner during the trial. In re Imbler, 60 Cal.2d 554, 567, 35 Cal.Rptr. 293, 387 P.2d 6 (1963). This court respectfully disagrees.

"The suppression by the prosecution at the trial, of evidence favorable to an accused violates due process where the evidence is material either as to guilt or punishment, irrespective of the good or bad faith of the prosecution [citations omitted]."

Loraine v. United States, 396 F.2d 335, 339 (9th Cir.), cert. denied, 393 U.S. 933, 89 S.Ct. 292, 21 L.Ed.2d 270 (1968). See also Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967).

[18] There can be no doubt that had evidence of the third print been deliberately suppressed by the police, even if the prosecuting attorney was not aware of its existence, due process would clearly have been violated. See, for example, Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964), where the police had suppressed the results of fingerprint and ballistics analyses which tended to cast doubt upon whether the gun allegedly used was in fact the murder weapon. The same result follows if the material is negligently suppressed.

As our Court of Appeals has stated in Thomas v. United States, 343 F.2d 49, 53 (9th Cir. 1965):

"[A] conviction cannot stand where a prosecutor has, either willfully or negligently, withheld material evidence favorable to the defendant."

As to negligent suppression, see also the cases cited *supra* p. 808.

VI

Costello testified that as the killer fled he discarded his coat, which Costello later recovered and turned over to police. At the trial, the recovered coat was identified by Mrs. Hasson, as well as by Costello and Hillen as that worn by the killer.

Prior to trial, police exhibited the coat to a fellow worker of petitioner who testified at the state habeas corpus hearing that he had told police he had never seen petitioner wearing such a coat, or anything like it. This evidence, petitioner contends, should have been disclosed to him.

The California Supreme Court stated that this evidence, tending to prove that the coat was not petitioner's, "would have been merely negative evidence of little probative value and could not have affected the outcome of the case". In re Imbler, 60 Cal.2d 554, 568, 35 Cal.Rptr. 293, 301, 387 P.2d 6, 13 (1963).

The state, at oral argument, explicitly conceded that failure of the prosecution to disclose this evidence to the defense was error. The same admission is made by implication in the remarks of the California Supreme Court. However, the state contends that such error was harmless.

[19, 20] The federal harmless error test, to be applied to constitutional errors, requires, as noted below, in order to find such an error harmless, that the court be able to declare it harmless beyond a reasonable doubt. Because no physical connection between the tangible evidence and petitioner was made, and because the jury was prevented from hearing any testimony tending to negate any such connection, although such testimony was available, such a declaration in this case is impossible. To hold otherwise would be to indulge in pure speculation, and would be a clear violation of the federal standards. See, for example, United States ex rel. Hill v. Deegan, 268 F. Supp. 586, 591 (S.D.N.Y.1967).

The court similarly dispenses with the argument that such evidence concerning the coat was equally available to petitioner. The record in this case nowhere indicates that petitioner even knew of the coat's existence before it was introduced at the trial. If petitioner is in fact innocent, he would not have known there was a coat involved, and it was therefore, for all practical purposes, not

available to him. See Lee v. United States, 388 F.2d 737 (9th Cir. 1968).

VII

[21] Petitioner has raised substantial questions concerning his rights at the pre-trial lineup procedure during which he was identified. See, *e.g.*, Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969). However, this court need not rule upon those contentions in light of its decision on the other issues. Moreover, petitioner has failed to exhaust his state remedies on these grounds, and this court therefore declines to consider their merits.

VIII

The harmless error doctrine, as applied to federal constitutional error, is set forth in Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967):

> "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

Although the Supreme Court stated it was merely adhering to the test provided in Fahy v. Connecticut, 375 U.S. 85, 86, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963) (whether there was a reasonable possibility that the evidence might have contributed to the conviction) its restatement of the rule in fact appears to be more stringent. It should be noted that *Chapman, supra*, was not decided until after the California Supreme Court's adverse determination of petitioner's claims.

[22] The California Supreme Court is without question at the forefront of advancing and protecting the constitutional rights of the accused. Although this court cannot give a state court's conclusions of law as to federal constitutional questions binding effect, Townsend v. Sain, 372 U.S. 293, 318, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), determinations of the California Supreme Court in this field have earned much respect and deserve great weight. Nevertheless, this court must draw independent conclusions of law, and, in light of the United States Supreme Court's recent restatement of the federal harmless error rule, it must respectfully disagree with the California court.

[23, 24] The total and cumulative result of all the constitutional errors committed at petitioner's trial prohibits a declaration that, beyond a reasonable doubt, those errors were harmless. This court finds upon review of the record of the entire trial that petitioner was denied a fair trial, and that his federally protected right to due process of law was thereby violated. Even if evidence of petitioner's guilt were overwhelming, the right to a fair trial may not be abrogated. Jackson v. California, 336 F.2d 521, 523 (9th Cir. 1964).

Therefore, this court concludes that the harmless error doctrine does not save petitioner's conviction.

IX

ORDER

It is the order of the court that unless the State of California shall institute proceedings within 60 days from the date this order becomes final to retry the petitioner, a writ of habeas corpus will be granted by this court.

It is further ordered that the court reserves jurisdiction over the parties in regard to this cause.

It is further ordered that the clerk this day shall serve copies of this order by United States mail upon the Attorney General of the State of California, the respondent, petitioner and his counsel, the District Attorney of Los Angeles County, the Honorable Joseph A. Wapner, Presiding Judge of the Superior Court of Los Angeles County, and the Honorable William B. Keene, Presiding Judge of the Criminal Courts Department of the Superior Court of Los Angeles County.

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FILED

JUN 30 1972

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY

JUN 30 1972

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL KERN IMBLER,

Plaintiff,

vs.

RICHARD PACHTMANN, et al.,

Defendants.

CIVIL NO. 71-123-RJK

OPINION AND ORDER GRANTING DEFENDANT RICHARD PACHTMANN'S MOTION TO DISMISS AND DIRECTING ENTRY OF FINAL JUDGMENT

Defendant Richard Pachtmann brought this motion "...[t]o dismiss the action because the complaint fails to state a claim...upon which relief can be granted," pursuant to Federal Rules of Civil Procedure 12(b)(6). The issue raised by Pachtmann is whether he is immune from liability under the Civil Rights Act, 42 U.S.C. § 1983, et seq., by virtue of the doctrine of prosecutorial immunity.

After a jury trial in the Superior Court of the State of California, County of Los Angeles, plaintiff was convicted of first degree murder and assault with a deadly weapon with intent to commit murder; he was sentenced to death on the murder charge and to a term of imprisonment not to exceed ten years on the assault ch arge. The judgment was affirmed by the California Supreme Court, People v. Imbler, 57 Cal. 2d 711, 21 Cal. Rptr. 568, 371 P.2d 304 (1962), and, thereafter, plaintiff petitioned the California Supreme Court

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for a writ of hebeas corpus which was denied, In re Imbler, 60 Cal. 2d 554, 35 Cal. Rptr. 293, 387 P.2d 6 (1963), cert. denied, 379 U.S. 908, 85 S.Ct. 196. Later, plaintiff filed a second petition for a writ of habeas corpus in the State Courts challenging the trial court's instructions that in determining the penalty the jury could consider the possibility of parole after seven years imprisonment. Holding that these instructions were improper, the California Supreme Court reversed the judgment imposing the death penalty, In re Imbler, 61 Cal. 2d 556, 35 Cal. Rptr. 293, 387 P.2d 6 (1964), and, on remand, plaintiff was sentenced to life imprisonment on the murder charge.

Plaintiff unsuccessfully sought a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of California, but that Court's denial of the petition was reversed by the Court of Appeals and transferred pursuant to 28 U.S.C. § 2241(d), Imbler v. Craven, 397 F.2d 277 (9th Cir. 1968), to this District where a Judge of this Court granted the petition, Imbler v. Craven, 298 F. Supp 795 (C.D. Cal. 1969), affirmed, Imbler v. California, 424 F.2d 631 (9th Cir. 1970), cert. denied, California v. Imbler, 400 U.S. 865, 91 S.Ct. 100 (1970).

Thereafter, plaintiff brought this action against Pachtmann, the Deputy District Attorney who prosecuted the criminal case in the Superior Court, and certain others. The First Amended Complaint, which the Court permitted to be filed on April 18, 1972, alleges that Pachtmann, along with certain other named defendants, conspired to commit and committed a series of acts of "deliberate malfeasance, misfeasance, non-feasance, failure to inform and correct," all designed to deprive plaintiff of life, liberty and due process of law by unlawfully charging and obtaining his

conviction for murder and assault with intent to commit murder. Pachtmann is alleged to have committed these acts in his capacity as a Los Angeles County Deputy District Attorney and in his individual capacity.

As part of this conspiracy to deprive plaintiff of a fair trial, Pachtmann is alleged, knowingly, to have produced false and perjured testimony prejudicial to plaintiff in that he called as a witness one Costello, a convicted felon who had been committed to an institution for the criminally insane. Costello, allegedly with Pachtmann's knowledge, testified falsely as to his educational background, his mental competence, his purported "viewing of pretrial photographs," and to have given untrue and prejudicial identification testimony implicating plaintiff in the criminal acts charged in his Superior Court trial; Pachtmann allegedly did nothing to correct this use of false and perjured testimony.

It is further alleged that Pachtmann ordered officers of the Los Angeles Police Department to refrain from arresting Costello on a charge of forgery until Pachtmann had concluded his use of Costello as a witness, all of which conduct plaintiff asserts constitutes a traditionally exclusive police activity within the purview of Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965). The First Amended Complaint also alleges that Pachtmann suppressed true and elicited false fingerprint evidence and expert testimony, acted to alter a sketch of plaintiff used for identification purposes, and, with another, suppressed the results of polygraph tests which exculpated plaintiff.

The First Amended Complaint further attempts to incorporate by reference the decision of this Court in Imbler v. Craven, 298 F. Supp. 795 (C.D. Calif. 1969), plaintiff's successful habeas corpus proceeding under 28 U.S.C. § 2254,

and alleges that the findings therein made by a Judge of this Court are binding in the present action. While the Court may, of course, take judicial notice in this proceeding of matters determined in other Court actions, a plaintiff proceeding under 18 U.S.C. § 1983 must allege highly specific facts, not mere conclusory allegations, Weyandt v. Mason's Stores, Inc., 279 F. Supp. 283 (W.D. Pa. 1968), Pugliano v. Staziak, 231 F. Supp. 347 (S.W. Pa. 1964), affirmed 345 F.2d 797 (3d Cir. 1965), and prove these allegations by a preponderance of the evidence, Walyd v. Kane, 283 F. Supp. 450 (E.D. Wis. 1968). Even though a state court adjudication may not, under certain extraordinary circumstances not here present, be res judicata against a plaintiff in a subsequent federal civil rights action growing out of the same incident, Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969), the Court knows of no authority which sanctions, much less requires, that findings in a proceeding under 28 U.S.C. § 2254 be applied as res judicata or collateral estoppel in favor of a plaintiff in a subsequent federal civil rights action growing out of the same incident. Particularly is this so where, as here, the parties defendant are different and there has been no showing of any substantiality of interest between the defendant in the habeas corpus proceeding and the present defendants. Hence, in determining the present motion to dismiss, the Court limited its consideration to the specific factual allegations of the First Amended Complaint and considers that the findings of Imbler v. Craven, supra, as such, have no bearing on the disposition of the present motion.

The question presented by this motion is whether the acts of Pachtmann alleged in the complaint are embraced by the immunity extended to prosecutors acting within the scope and course of their official duties. In determining the

sufficiency of the First Amended Complaint to state a claim upon which relief can be granted, the Court must, of course, accept the allegations of the First Amended Complaint as true and in the light most favorable to the plaintiff. Robichaud v. Ronan, supra, at 534.

Basis for Prosecutors' Immunity

42 U.S.C. § 1983, upon which jurisdiction of the present action is premised, provides:

> "§ 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Jurisdiction for suits brought under § 1983 is vested in the District Courts by virtue of 42 U.S.C. § 1988.

No immunity from liability for the proscribed conduct is mentioned in the statute, but the doctrine of prosecutorial immunity has been engrafted in favor of certain public officials for acts done in the course and scope of their employment. Courts have repeatedly held that public prosecutors are immunized from civil liability for acts done as part of their traditional official functions. Dodd v. Spokane County, 393 F.2d 330 (9th Cir. 1968); Agnew v. Moody, 330 F.2d 868 (9th Cir. 1964), cert. denied, 379 U.S. 867, 85 S.Ct. 137; Diaz v. Chatterton, 229 F. Supp. 19 (S.D. Cal. 1964); Kostal v. Stoner, 292 F.2d 492 (10th Cir. 1961), cert. denied, 369 U.S. 868, 82 S.Ct. 1032, rehrg, denied, 370 U.S. 920, 82 S.Ct. 1559; Puett v. Detroit, Dept. of Police, 323 F.2d 591 (6th Cir. 1963), cert. denied, 376 U.S. 957, 84 S.Ct. 978; Jennings v. Nester, 217 F.2d 153 (7th Cir. 1954), cert.

denied, 349 U.S. 958, 75 S.Ct. 888.

Several reasons have been advanced in support of prosecutorial immunity: (1) to avoid influencing prosecutorial decisions by threat of civil liability, (2) to avoid deterring qualified persons from entering employment as prosecutors, (3) to avoid wastefully draining prosecutors' time and energy on matters collateral to their prosecutorial functions, and (4) to encourage and enforce honesty and efficiency among prosecutors through ballot and formal removal proceedings rather than civil litigation. See Robichaud v. Ronan, supra, at 536, 537.

Scope of Prosecutorial Immunity

The courts have repeatedly asserted that the immunity afforded prosecutors and other quasi-judicial personnel is equated, in scope, with that afforded Judges. Friedman v. Younger, 282 F. Supp. 710 (C.D. Cal. 1968); Clark v. State of Washington, 366 F.2d 678 (9th Cir. 1966); Robichaud v. Ronan, supra.

This immunity is not, however, without limit and under some circumstances prosecutors lose their immunity if their acts are beyond the scope of the prosecutorial function. Robichaud v. Ronan, supra; Corsican Productions, Inc. v. Pitchess, 338 F.2d 441 (9th Cir. 1964). Thus, neither the title under which a prosecutor acts nor the characterization of his activities will suffice to bring him within the scope of the privilege. See Robichaud v. Ronan, supra. Instead, the Court of Appeals of this Circuit has said:

> "[t]he trial court must determine the nature of the acts alleged to have been wrongfully committed.... If...the commission of acts...are related to police activity as opposed to judicial activity, then the cloak of immunity should not protect them."
>
> Robichaud v. Ronan, supra at 537.

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In Robichaud, upon which plaintiff relies, defendants prosecuted plaintiff on a charge of first degree murder. The complaint was filed with malicious motive and without probable cause, and pursuant to the charge plaintiff was arrested and placed in custody for a non-bailable offense. During her imprisonment plaintiff was taken to another county, the scene of the alleged crime, and without being afforded counsel, was threatened and intimidated in an unsuccessful effort to obtain her confession. Though there was insufficient evidence to establish probable cause for the crime charged, defendants refused to dismiss the complaint, refused to produce evidence or to proceed with a preliminary hearing and, thereby, deprived plaintiff of her rights. Robichaud v. Ronan, supra, at 534, 535.

Whether Robichaud answers the question here presented is unclear. It appears to affirm the traditional doctrine that acts within the course and scope of the prosecutorial function remain privileged, but the holding does not distinguish between those allegations of the complaint in Robichaud which come under the privilege and those which do not. Indeed, many of the acts upon which the complaint therein appears predicated would seem to be acts well within the traditional scope of prosecutorial activity. Moreover, the Court stated that a prosecutorial immunity ceases to exist when the prosecutor is no longer functioning as such, but is instead, engaging in conduct usually associated with police activity. Robichaud v. Ronan, supra, at 536. This distinction is easier to draw than to apply. For example, investigation and interrogation of witnesses, including the accused may properly be part of the prosecutorial activity though this activity is also associated with police activity. It is not clear from Robichaud whether prosecutors are to be

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immune from civil liability only for part of their traditional functions and, if so, whether this does not, in effect, completely undermine prosecutorial immunity. In the context of the Robichaud case it would appear that malfeasance by way of gathering and presenting perjured testimony would come within the ambit of the privilege while directing an arrest on the basis of such testimony would not lay within the privilege. See Robichaud v. Ronan, supra, at 537.

Sufficiency of the Pleadings

Though the matter before the trial court in Robichaud was, as here, a motion to dismiss the complaint, the Court of Appeals stated:

> "[t]he trial court must determine the nature of the acts alleged to have been wrongfully committed, for the appellees may have abandoned their 'quasi-judicial' role. If they, so doing, committed acts, or authoratatively directed the commission of acts, which ordinarily are related to police activity as opposed to judicial activity, then the cloak of immunity should not protect them."
>
> Robichaud v. Ronan, supra, at 537

But the test appears to be, not whether the prosecutor acted wrongfully, but rather, whether the acts were committed by him in the performance of functions of the sort normally regarded as part of the prosecutor's role under the judicial process.

Since prosecutorial functions and duties often and inevitably overlap with and are related to police activity, the nature of a prosecutor's acts need to be evaluated in light of all the facts and circumstances present and, hence, it would appear, require inquiry into the merits of the case. The mystery here is how a determination can be made on a motion to dismiss (which function is merely to test the legal sufficiency of the allegations of the complaint) if the trial court

is required to adjudicate the merits of plaintiff's case. It appears that the logical inference to be drawn from Robichaud is that dismissal under Fed. R. Civ. P. 12(b)(6) is not proper in a case involving prosecutorial immunity.

If this correctly interprets the effect of Robichaud then the present motion to dismiss must, of course, be denied. But because the complaint in this case lacks specific allegations of police-type activity by Pachtmann, it would appear that Pachtmann should be dismissed if Fed. R. Civ. P. 12(b)(6) may be applied.

The complaint does allege that Pachtmann requested police officers to refrain from arresting a witness at Imbler's trial until Pachtmann had an opportunity to complete his examination of the witness. But this act appears to have been in furtherance of Pachtmann's alleged attempt to elicit courtroom testimony against Imbler and does not appear to have an independent basis for being deemed police activity such as was the case in Robichaud. There, plaintiff was caused by the prosecutor and police officers to be removed from jail, taken to the scene of the purported crime and there intimidated, unsuccessfully, in an attempt to obtain her confession. A much more substantial nexus between the alleged offending conduct of the prosecutor and police activity existed in Robichaud than is here presented. The only other basis for connecting the conduct charged in the present complaint with police activity is the alleged attempt to ascribe certain fingerprints and police sketches as those of Imbler. Though Pachtmann is not specifically charged with this conduct, it is alleged that he is "chargeable under federal law" with this conduct carried out by others.

Except for the portions of the complaint above referred to, the remaining allegations state, in substance,

that Pachtmann produced perjured and false testimony in an attempt to convict Imbler. In other words, the prosecutor is alleged to have acted badly, perhaps wrongfully and even maliciously. Regardless of how limited the scope of prosecutorial activity may properly be, it would appear that the production of testimony is well within the traditional function of prosecutors no matter how wrongfully done and, hence, within the prosecutorial privilege.

For the foregoing reasons, the Court considers dismissal under Fed. R. Civ. P. 12(b)(6) is proper, and therefore,

IT IS ORDERED that the action be and the same is hereby dismissed as to defendant Richard Pachtmann.

Nonetheless, because of uncertainty whether the application of Fed. R. Civ. P. 12(b)(6) is permissible in light of Robichaud v. Ronan, supra, this Opinion and Order certifies, pursuant to Fed. R. Civ. P. 54(b), that the Court expressly determines that there is no just reason for delay and expressly directs the entry of a final judgment dismissing the action as to the defendant Richard Pachtmann; accordingly,

IT IS FURTHER ORDERED that final judgment be entered herein dismissing the action as to defendant Richard Pachtmann.

IT IS FURTHER ORDERED that the Clerk of the Court send, by United States mail, copies of this Opinion and Order to all counsel herein.

DATED: June 30, 1972

Robert J. Kelleher
United States District Judge

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FPI-Sandstone

Supreme Court, U. S.
FILED
MAR 17 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5435

PAUL KERN IMBLER,
Petitioner,

—v.—

RICHARD PACHTMAN, District Attorney,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 17, 1974
CERTIORARI GRANTED FEBRUARY 24, 1975

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5435

PAUL KERN IMBLER,

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—v.—

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CIVIL DOCKET

UNITED STATES DISTRICT COURT

71-123-RJK

Jury demand date:

PAUL KERN IMBLER, PLAINTIFF

vs.

RICHARD PACHTMANN, as an individual, RICHARD PACHTMANN, as an agent of the County of Los Angeles, Office of the District Attorney, Joseph Busch, District Attorney of the County of Los Angeles; DE WITT LIGHTNER, as an individual; SANFORD MCCALEB, as an individual; KENNETH W. SCARCE, as an individual; ECTOR A. GARCIA, as an individual; DEWITT LIGHTNER, SANFORD MC CALEB, KENNETH W. SCARCE, DONAL H. SEARS, and ECTOR A. GARCIA, as police officer agents of the City of Los Angeles, Department of Police, EDWARD M. DAVIS, Chief of Police of the City of Los Angeles, JAMES NUNNELLEY, as an individual, JAMES NUNNELLEY as an agent of the County of Los Angeles, Office of the Public Defender, RICHARD BUCKLEY, Public Defender, RICHARD BUCKLEY, Public Defender of the County of Los Angeles, MANLEY J. BOWLER as an individual, MANLEY J. BOWLER as a member of the Adult Authority of the State of California, WILLIAM MC KESSON, as an individual, and as an agent of the County of Los Angeles, EVELLE J. YOUNGER as an individual and as an agent of the County of Los Angeles and of the State of California, ALBERT —. HARRIS as an agent of the State of California and as an individual, THOMAS C. LYNCH, as an agent of the State of California, DEFENDANTS

For plaintiff:

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Statistical Record	Costs	Date	Name or Receipt No.	Rec.	Disb.
J.S. 5 mailed	Clerk	1/15/71	13240	15—	1-19-71
		7/5/72	53370	5—	7/6/72
J.S. 6 mailed	Marshall				
Basis of Action: Civil Rights Complt	Docket fee				
	Witness fees				
Action arose at:	Depositions				

DOCKET ENTRIES

DATE	PROCEEDINGS
1/15/71	Fld Complt for Violation of Civil Rights. Issd summs—Md JS-5.
1/23/71	Fld retn of summs.
5/12/71	Fld not of hrg retable 6/1/71 to show cause why the action should not be dismissed for lack of prosecution.
5/17/71	Fld prae for & issd alias summs as to Richard Pachtmann, DeWitt Lightner, Sanford McCaleb, Kenneth W. Scare, Ector A. Garcia and Donal Sears.
5/18/71	Fld plf return to the OSC.
5/19/71	Upon request of cnsl for plf & good cause appearing, it is ord that hrng on OSC re: dismissal is cont for hrng to 6/21/71, 10 AM.

DATE	PROCEEDINGS
6/10/71	Fld retn of alias summs.
6/16/71	Fld deft's McCaleb & Garcia affid of John T. Neville in support of ex parte ord extending time to plead; LODGED proposed ex parte ord extending time to plead.
6/28/71	Fld pltf's reqst for & entered dflt as to Sanford McCaleb: Fld pltf's reqst for & entered dflt as to Ector A. Garcia.
*6/21/71	Ct ords hrg On OSCre: dismissal cont to 7/12/71, at 10am.
7/12/71	Fld ex parte ord (RJK) extending time of plead to the complt retable 7/26/71.
7/16/71	Fld deft's affid of service by mail.
*7/12/71	Cnsl for plft informs ct re: status of case as to svc of defts. Ct ords fur hrng on OSC re: dismissal cont to 10/18/71, at 10am & fur ords that defaults htf ent as to defts Garcia & McCaleb are set aside.
7/27/71	Fld deft's McCaleb & Garcia affid of John T. Neville in support of ex parte ord extending time to plead.
8/ 2/71	Fld ex parte ord (RJK) extending time to plead retable 8/25/71.
8/25/71	Fld ANSWER of the deft, Ector A. Garcia, to the plft's complt; Fld ANSWER of the deft, Stanford R. McCaleb, to the plft's complaint; Fld deft's McCaleb Q Garcia demand for Jury Trial.
9/ 9/71	Fld interrogs propounded to deft Richard Pachtmann.
9/28/71	Fld plft interrogs propounded to deft Ector A. Garcia; Fld plft interrogs propounded to the deft Sgt. Sanford McCaleb.

DATE	PROCEEDINGS
10/18/71	Cnsl for plft informs ct that he has had trouble serving some deft's because the City Atty's office will not disclose the addresses of certain police officers who have retired. The ct informs cnsl for plft to go talk to the City Atty's office again re: svc of certain deft's & to mk clear to the City Atty ct's position on this problem. Ct ords fur hrng on OSC cont to 11/8/71, at 10am.
11/ 2/71	Fld Richard Pachtmann, not of mot retable 11/29/71, at 2 PM, mot to dismiss & pts & auths.
11/ 8/71	Fld stip & ord (RJK) extending time to ans or object to interrogs requested by plft of deft's, Ector A. Garcia & Standford R. McCaleb retable 12/15/71. Fur hrng held on OSC re: dismissal & ct informs cnsl for plft that the Clerk has the addresses of the defts the plft wants in order to sve said deft's; that the Clerk will give the addresses to the US Marshall & will have the addresses ord put under seal after the defts have been svc. Ct ords fur hrng cont to 1/17/72, at 10am.
11/23/71	Fld plft pts & auths in oppos to mot to dismiss case against Richard Pachtman;
11/29/71	No appearance by cnsl for deft, Ct ords deft's mot to dismiss as to deft Pachtmann denied. Cnsl for plft to prepare ord pur to Local Rule 7.
12/ 2/71	On Crt's own mot, ord mot of deft Richard Pachtmann is cont for hrg to 12/14/71, 9:30 am.
12/14/71	Hrng held by ct on deft Pachtmann's mot to dismiss. Cnsl argue mot to ct. Ct ords mot to stand submitted.

DATE	PROCEEDINGS
12/15/71	Fld ans to interrogs propounded to deft Ector A. Garcia, by plft; Fld ans to interrogs propounded to deft Stanford R. McCaleb, by plft.
1/12/71	Fld Prae for & Issd Second Alias Summs.
1/17/72	No appearance by cnsl for plft. Ct ords case dismissed as to all defts not yet served. Clrk to enter ord.
1/12/72	Fld plft interrogs propounded to the deft DeWitt Lightner; Fld plft interrogs propounded to the deft Donal H. Sears.
1/19/72	Fld disml by court for lack of prosecution as to certain defts.; JOSEPH BUSCH; EDWARD M. DAVIS; JAMES NUNNELLLEY; RICHARD BUCKLEY; MANLEY J. BOWLER; WILLIAM KcKESSON; EVELLE J. YOUNGER; ALBERT W. HARRIS & THOMAS C. LYNCH, mld cpys (Ent 1/20/72) ntfd prtys
2/ 4/72	Fld Ex Parte Ord (RJK) extend time to defts, De Witt Lightner, Donal H. Sears and Kenneth W. Scarce, to plead to complnt and extend time to defts, Donal H. Sears and De Witt Lightner, to respond to interrogs by pltf; Affidavit of John T. Neville in support of ord. retnbl 3/3/72 to plead complnt & 4/3/72 to answer or object to interr
2/11/72	Fld deft's affid of service by mail.
2/23/72	Fld Donal H. Sears mot & not of mot retnbl 3/13/72, 10am to dismiss complnt, Alternative mot for a more definite stmt and pts & authors in support thereof; Fld De Witt Lightner mot & not of mot retnbl 3/13/72, 10am to dismiss complnt; pts & authors in support thereof.: Fld Kenneth W. Scarce mot & not of mot retnbl 3/13/72, 10am to dismiss complnt; pts & authors in support thereof.

DATE	PROCEEDINGS
3/13/72	Fld plft not of mot retable 4/3/72, 10 am, to compel ans to written interrogs. Fld Paul Kern Imbler oppos to mot to dismiss pts & auths; Fld amendment to paragraph II page 10-11 of Complt, response to request for more definite & certain allegations; Hrg held by ct on defts Lightner, et al's mot to dismiss & ct ords mots under submission. Later, ct ords mots to dismiss denied w/o prej; that plft has until 4/13/72 in which to file amended complt as to defts Lightner, Sears & scare.
4/ 3/72	Fld ans to interrogs propounded to deft Donol H. Sears, by plft; Fld ans to interrogs propounded to deft, DeWitt Lightner, by plft.
4/ 4/72	On ct's own mot, ord hrng on pltf's mot to compel ans to interrogs is cont for hrng to 4/17/72, 10am.
4/11/72	Fld ord (RJK) denying mot of defts Scarce, Sears, & Lightner to dismiss.
4/14/72	Fld plf's mot to compel ans to written interrogs.
4/17/72	Ct informs cnsl that mot of deft Pachtmann presently under submission will be granted & ct will ent fld ord shortly. Fur ord that plft's mot to compel ans to interrogs is cont for hrng to 5/22/72, at 10am & that ct's ord of dismissal will contain a stay ord & certify mot to dismiss for purposes of appeal.
4/18/72	Fld Plf's FIRST AMENDED COMPLAINT. Fld deft's pts & auths affid in oppos to mot to compel ans to written interrogs.
5/ 1/72	No appearance by cnsl for plft. Ct ords plft's mot re: ans to interrogs cont for hrng to 6/5/72, 10am & cnsl for deft has until 6/5/72 in which to respond to amended complt.

DATE	PROCEEDINGS
5/ 4/72	Fld deft's not of contd of mot to compel ans to interrogs to 6/5/72.
5/22/72	Ct ords hrng on plft's mot to compel ans to interrogs is cont to 6/26/72, at 10am.
6/ 5/72	Fld deft's Sears, Lightner, McCaleb, Garcia & Scarce not of mot retable 6/26/72, 10am, & mot to dismiss first amended complt, pts & auths in support.
6/ 5/72	Ct ords plft's mot for and ord compelling ans to interrogs by defts Sears & lighter off cal, subject to being restored to to cal on notice by plft.
6/30/72	Fld opin & ord grntg deft's mot to dism & directing entry of final judmt; Fld judgmt & ord thereon that the action be dismd as to deft Richard Pachtmann. (Ent 6/30/72) mld cpys & ntfd prtys
7/ 5/72	Fld plft NOTICE OF APPEAL, w/affid of service, copies to (RJK) & R.E.; Fld plft designation of records on appeal.
*6/26/72	Ct informs cnsl that opinion & ord dism Pachtmann will be signed today & ords all mots now pending & all matters off cal.

[Crim. No. 6999. In Bank. May 17, 1962.]

THE PEOPLE, PLAINTIFF AND RESPONDENT,

v.

PAUL KERN IMBLER, DEFENDANT AND APPELLANT.

* * * *

APPEAL automatically taken under Pen. Code, § 1239, subd. (b), from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Mark Brandler, Judge. Affirmed.

Prosecution for murder and for assault with a deadly weapon with intent to commit murder. Judgment of conviction imposing the death penalty on the murder count, affirmed.

Gregory S. Stout, under appointment by the Supreme Court, for Defendant and Appellant.

Stanley Mosk, Attorney General, William E. James and Gilbert F. Nelson, Assistant Attorneys General, for Plaintiff and Respondent.

TRAYNOR, J.—Defendant was convicted of first degree murder and of assault with a deadly weapon with intent to commit murder. The jury fixed the penalty at death, and the trial court denied defendant's motion for a new trial. This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

On the evening of January 4, 1961, two men entered a Los Angeles grocery store owned by Morris Hassen. They walked to the check stand where Mr. Hassen was leaning down dusting liquor bottles. Mrs. Hassen, who was standing nearby, testified that she moved to the check stand to wait on the men, that as she did so she noticed her husband getting up from behind the stand and that "by the look of his face" she could see that something was wrong. When she bent down to ask what the trouble was, she saw a gun protruding from the coat of the man

subsequently identified by other witnesses as defendant. A moment later the gun discharged, fatally wounding Mr. Hassen. The men turned, walked from the store, and departed in different directions.

At the trial defendant denied participating in the crime. His defense consisted primarily of an alibi and impeachment of the identification witnesses. The evidence, however, was more than sufficient to establish that he did the shooting. Although Mrs. Hassen was unable to see his face because his hat was tilted, she was able to identify the hat and coat he was wearing. She identified the second man from police photographs as Leonard Lingo, who was killed 10 days after the shooting when he accompanied defendant on an armed robbery in Pomona.

Alfred Costello, an identification witness, was walking on the opposite side of the street when his attention was attracted to the store by two men standing at the cash register. When he heard a shot he crossed the street to investigate, and in a lighted area in front of the store and at a distance between 8 and 12 feet, he viewed defendant who was still wearing the hat and coat and still carrying a gun. According to Costello, defendant turned into an alley, dropped his hat, and began to run. Costello gave chase. Defendant paused in the alley under a light as if "trying to make up his mind whether to go right or left," and Costello was able to see him without the hat at a distance between 15 and 20 feet. Defendant then fired a shot that hit a wall behind Costello, discarded his coat, and fled through a parking lot. Costello retrieved the coat and discovered a gun in it identified by a ballistics expert as the murder weapon. Costello positively identified defendant as the man he had pursued.

Alonzo Dunlap, an attendant at the parking lot through which defendant escaped, testified that he got a side and front view of defendant as he walked through the illuminated lot. Although Dunlap did not hear any shots, his testimony otherwise corroborated Costello's testimony.

Billy Hillen, a third witness, was leaving the market when defendant and Lingo entered. He testified that he got a good look at both men, and he identified defendant's hat and coat. When Hillen had walked only a few steps

from the store, he heard a shot and turned around. He again looked closely at the two men as they left the store, and observed defendant holding a gun. Hillen had no difficulty in picking defendant out of a lineup at police headquarters, and he also identified defendant at the trial.

Defendant testified that he spent the evening of the shooting in various bars with Jerry Mayes, Robert Mahon, and two men whose names he could not recall, and that he was also accompanied by a girl named Ann at the bar where he claimed to be at the time of the killing. Only Mayes could be located to testify in defendant's behalf, although an investigator attached to the public defender's office attempted to trace the others. Mayes, who was in custody for accompanying defendant and Lingo on the Pomona robbery, corroborated defendant's testimony on all but minor points. On cross-examination, however, he admitted that "it's hard to be certain" that the evening he recalled was the night of the murder. Dewitt Lightner, a police officer, testified that he had asked defendant if he had any alibi that could be checked out, and that defendant replied in effect that he could not account for his time, but that he was probably drinking at the Four Aces Bar, and that he also said there was no one with him who could account for his time.

Defendant contends that even if the evidence was sufficient to sustain a finding that he was the killer, it did not demonstrate that a robbery was being perpetrated that would make the killing murder in the first degree. (Pen. Code, § 189; *People* v. *Coefield*, 37 Cal.2d 865, 868 [236 P.2d 570].) The only instructions given to the jury on degrees of murder were: "Murder is classified into two degrees, that of murder in the first degree and that of murder in the second degree" and "All murder which is committed in the perpetration or attempt to perpetrate robbery is murder of the first degree." The court also defined robbery and attempt. Admittedly, there was no evidence that defendant or Lingo demanded money of the deceased or that they took money after the killing. Indeed, since defendant asserted throughout the trial that

he was not the killer, there was no explanation why the gun discharged. [1] The evidence establishes, however, that defendant and his confederate entered the store of a total stranger with a loaded gun at the ready; they walked to the cash register and shot the proprietor when he emerged from under the counter. These were overt acts toward committing a robbery that clearly justify an inference that there was a specific intent to commit that crime. Such intent may be established by the circumstances surrounding a defendant's actions. (*People* v. *Jennings*, 158 Cal.App.2d 159, 165-166 [322 P.2d 19]; see *People* v. *Hubler*, 102 Cal.App.2d 689, 695 [228 P.2d 37]; *State* v. *Burnett*, 37 Wn.2d 619 [225 P.2d 416, 417-418].) [2] The inference that defendant intended to commit robbery is also supported by his subsequent participation with Lingo in the robbery in Pomona, evidence of which was admitted without objection and indeed elicited in part by the defense. (See *People* v. *Coefield*, *supra*, at pp. 869-870; *People* v. *Peete*, 28 Cal.2d 306, 315-316 [169 P.2d 921]; 7 U.C.L.A. L.Rev. 463.) [3] There was no evidence offered tending to show that defendant entered the store for any purpose other than robbery, and it is difficult to conceive of any other purpose. The trial court, therefore, did not err in failing to instruct on second degree murder. (*People* v. *Green*, 13 Cal.2d 37, 44 [87 P.2d 821]; *People* v. *Lloyd*, 98 Cal.2d 305, 311 [220 P.2d 10]; *People* v. *Sameniego*, 118 Cal. App. 165, 170-171 [4 P.2d 809, 5 P.2d 653]; see *People* v. *Moran*, 18 Cal.App. 209 [122 P. 969].)

Defendant contends that the trial court committed prejudicial error in admitting hearsay evidence. Before defendant was taken into custody a police artist made a drawing of the killer as described by the witness Costello. The picture was modified later, following suggestions of Costello and other witnesses. At trial, Costello was shown the picture, and he identified it. The picture was first admitted into evidence without objection, but defendant's counsel was later allowed to interpose the objections of lack of foundation and immateriality. The picture was again admitted. Although the picture was a representation of extrajudicial declarations of the witness regarding the killer's physical characteristics, Costello, the po-

lice artist, and other identification witnesses all testified and were cross-examined on the matter. (See *People* v. *Gould*, 54 Cal.2d 621, 626 [354 P.2d 865]; Morgan, Hearsay Dangers, 62 Harv.L.Rev. 177, 192-193.) [4] "[A]n extrajudicial identification is admissible, not only to corroborate an identification made at the trial [citation], but as independent evidence of identity." (*People* v. *Gould*, *supra*.) [5] Similarly this pictorial embodiment of a physical description is admissible for that purpose. The defense attempted to show that Costello identified defendant at a police lineup only after he had heard the other witnesses do so. The implication that he could not make a certain identification could be offset by showing that he had previously described defendant with sufficient accuracy that an artist could construct a reasonable likeness of defendant after other witnesses made minor corrections.

[6] Defendant asserts that his counsel was unduly restricted in his *voir dire* examination of a prospective juror regarding the juror's views on capital punishment. Counsel has the right to inquire into the juror's opinions on the subject (*People* v. *Hughes*, *ante*, pp. 89, 96 [17 Cal.Rptr. 617, 367 P.2d 33]), but the record reveals that this right was not infringed. Defendant's counsel asked the juror whether he knew that an organization to which the juror belonged advocated retaining the death penalty. The juror answered that he did not, and at this point an objection was sustained as to the form of the question only. Counsel was then allowed to question the juror on his personal beliefs as opposed to those of the organization. Apparently counsel was satisfied with the answers, for he passed the juror for cause.

[7] There is no merit in defendant's contention that he was prejudiced by restrictions on his counsel's attempt to impeach the witness Costello on the ground he lacked mental capacity. The trial court allowed counsel the greatest latitude in his cross-examination. He was allowed to question Costello about commitment to mental institutions despite the fact that the most recent commitment was more than 10 years before the trial. Counsel

also asked a number of questions regarding recent treatment for mental disorder, and the answers were negative.

[8] Equally without merit is defendant's contention that he was not allowed to show that at the police lineup the witnesses were uncertain in identifying him and that they discussed among themselves whether he was the right man. The record reveals that the defense was allowed to explore the matter as thoroughly as desired and that the answers elicited were damaging to the defense. The objections sustained by the court were primarily to the form of questions asked. There is nothing in the record to indicate that counsel was unduly hampered in his cross-examination.

Defendant contends that the prosecutor's objections were so numerous that defense counsel was unable properly to conduct his case. Twice during the trial counsel objected to the court that he was being unduly harassed. The record, however, discloses no such harassment and indicates that the defense was permitted to present any relevant evidence it had.

[9] Defendant contends that his conviction must be reversed because he was taken into custody on January 14, 1961, but was not informed of the charges against him until the following February 14. Defendant was legally in custody during this time because he had pleaded guilty to the robbery in Pomona. Although he should have been taken before the magistrate on the murder charge within the time limit prescribed in Penal Code section 825, the failure to do so is not a ground for reversing the conviction. (*Rogers* v. *Superior Court*, 46 Cal.2d 3, 9-10 [291 P.2d 929].)

[10] Finally, defendant contends that under *People* v. *Love*, 56 Cal.2d 720, 731-732 [17 Cal.Rptr. 481, 366 P.2d 33, 809], he is entitled to a new trial on the penalty imposed because of the prosecutor's argument to the jury as to the deterrent effect of the death penalty. The prosecutor's discussion in that regard, offered to the jury as "another factor you can consider," was temperate and restrained and was only a brief and minor part of his argument. The error was therefore not prejudicial. (*Peo-*

ple v. *Garner*, *ante*, pp. 135, 156 [18 Cal.Rptr. 40, 367 P.2d 680].)

The judgment and order denying defendant's motion for a new trial are affirmed.

Gibson, C. J., McComb, J., Peters, J., White, J., and Dooling, J., concurred.

Schauer, J., concurred in the judgment.

[Crim. No. 7212. In Bank. Dec. 3, 1963.]

IN RE PAUL KERN IMBLER on Habeas Corpus

* * * *

PROCEEDING in habeas corpus to secure release from custody, or for a writ of error *coram vobis*, or other appropriate relief. Order to show cause discharged and petition denied.

Gregory S. Stout, Charles Hollopeter, Warren L. Ettinger, Albert C. Garber, Ellery E. Cuff, Public Defender (Los Angeles), Richard S. Buckley, Deputy Public Defender, Jules C. Goldstone and Low & Stone for Petitioner.

Stanley Mosk, Attorney General, John S. McInerny and Albert W. Harris, Jr., Deputy Attorneys General, William B. McKesson, District Attorney (Los Angeles), and Harry Wood, Deputy District Attorney, for Respondent.

TRAYNOR, J.—Petitioner was convicted of first degree murder and of assault with a deadly weapon with intent to commit murder. The jury fixed his penalty at death. This court affirmed the judgment and an order denying a motion for new trial. (*People* v. *Imbler*, 57 Cal.2d 711 [21 Cal.Rptr. 568, 371 P.2d 304].) In this proceeding, petitioner seeks a writ of habeas corpus, *coram vobis*, or other appropriate relief.

On January 4, 1961, two men entered a Los Angeles market, one of them shot and fatally wounded Morris Hasson, the proprietor, and they departed in different directions. The only eyewitness to the crime, Hasson's wife, was unable to identify the man who did the shooting, but later identified his accomplice. A passerby, Alfred Costello, ran toward the market when he heard the shot, and at the lighted entrance encountered a man leaving the store with a gun in his hand. Costello chased the killer through several parking lots adjacent to the store; the killer shot at Costello and dropped his hat and coat while making his escape. A pistol, later identified as the murder weapon, a razor in a plastic case, and a soiled handkerchief were in the coat.

Entirely on the basis of the identification testimony of several witnesses, petitioner was convicted of murdering Hasson in the perpetration of an armed robbery and of assault with intent to murder Costello. All attempts to tie the physical evidence at the scene of the murder to petitioner were fruitless, and a police expert testified that fingerprints on the murder weapon and on the razor and its case were too fragmentary to assign to anyone. Petitioner was identified as the man who left the store with a gun by Costello, who had seen the killer at the entrance of the store and again during the chase, by Billy Hillen, who was leaving the store as the two men entered and who testified that he had clearly seen them again as they left, and by Alonzo Dunlap, who was an attendant at one of the parking lots through which the killer escaped. Hillen and Mrs. Hasson identified the other man at the killing as Leonard Lingo, an accomplice of petitioner in an attempted robbery in Pomona on January 14, 1961. During this January 14 attempt, Lingo was killed and another accomplice, Jerry Mayes, was captured. On January 15, Imbler surrendered to the Pomona police.

Petitioner testified that he first met Lingo, whose identity as the accomplice of the killer was not disputed, on the morning of January 14 and that he spent the evening of January 4 with several other persons in various Los Angeles bars. Both alibis were corroborated by Mayes, his accomplice in the January 14 robbery attempt.

The petition alleges that the prosecution secured petitioner's conviction through the knowing use of perjured testimony and that newly discovered evidence completely undermines the entire structure of the case on which the

proscution was based. After examining the petition and the affidavits attached to it, we issued an order to show cause and appointed the Honorable Thomas P. White, retired Associate Justice of this court, as referee to take evidence directed to the following questions:

"1. Did any witness who testified against Paul Kern Imbler in the trial which resulted in the judgment of conviction, affirmed by this court in *People* v. *Imbler*, 57 A.C. 757 [57 Cal.2d 711 (2 Cal.Rptr. 568, 371 P.2d 304)], commit perjury as defined in the Penal Code of the State of California?

"2. In the event that any witness did commit perjury, did any representative of the State of California cause or suffer such testimony to be introduced, knowing such testimony as given was perjured?

"3. Did any representative of the State of California suppress or prevent the introduction of any evidence which, had it been given, would have been favorable to the defense of Paul Kern Imbler?

"4. What if any new evidence has been discovered that undermines the case presented by the prosecution at the time of the judgment of conviction of Paul Kern Imbler?"

[1] A judgment of conviction based on testimony known by representatives of the state to be perjured deprives the defendant of due process of law (*Mooney* v. *Holohan*, 294 U.S. 103, 112-113 [55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406]; *Pyle* v. *Kansas*, 317 U.S. 213, 216 [63 S.Ct. 177, 87 L.Ed. 214]) and may be attacked on habeas corpus (*In re Mooney*, 10 Cal.2d 1, 15 [73 P.2d 554]; *In re Lindley*, 29 Cal.2d 709, 722 [177 P.2d 918]; *In re Horowitz*, 33 Cal.2d 534, 537 [203 P.2d 513]). [2] In making such an attack, however, petitioner must establish by a preponderance of the evidence that perjured testimony was adduced at his trial, that representatives of the state knew that it was perjured (*In re Mooney*, *supra*, at p. 15; *In re Lindley*, *supra*, at p. 722), and that such testimony may have affected the outcome of the trial (*Napue* v. *Illinois*, 360 U.S. 264, 272 [79 S.Ct. 1173, 3 L.Ed.2d 1217, 1222-1223]; see *In re De La*

Roi, 27 Cal.2d 354, 365 [164 P.2d 10]; *In re Mitchell*, 35 Cal.2d 849, 856 [221 P.2d 689]).

[3] Petitioner alleges several instances of knowing use of perjured testimony. He first attacks Costello's identification testimony. At the preliminary hearing and at the trial, Costello identified petitioner as the man he chased, but when asked at the reference hearing if petitioner was that man, he testified that "at this time I will have to say no." This change in testimony alone does not constitute perjury, but merely indicates that Costello changed his mind. The pertinent inquiry is whether he testified at the trial contrary to his belief at that time. (See *People* v. *Von Tiedeman*, 120 Cal. 128, 134-137 [52 P. 155].)

[4] More than a year after the trial and several months before the reference hearing, Costello was interviewed by the police. A tape recording of that interview (the accuracy of which was challenged by Costello) disclosed that when asked if he had any doubts about his identification of petitioner at the trial, he answered: "No at that time there was no doubt. . . . I'm not worried about perjury because I don't think I perjured myself. I answered the question to the best of my knowledge and recollection." At the hearing, however, Costello claimed that he always had grave doubts about his identification. The referee found that he "testified of his own free will as to such identification based upon his own knowledge as disclosed by his testimony at both the preliminary examination and the trial of Petitioner in the Superior Court."

At the reference hearing, Costello also testified that he had told the police that he was extremely reluctant to testify because of his doubts, but that they had forced him to testify by holding some bad check charges over him. This charge was categorically denied by the police officers involved although they admitted having knowledge of several outstanding bad checks issued by Costello and of his previous convictions for issuing such checks. The referee found that the record "reflects definitely that no threats of any character were made to Costello with regard to the aforesaid worthless checks." Costello also

testified that he had expressed doubt about his identification, both before and after the trial, to at least 16 state officials, including members of the Los Angeles Police Department, members of the Vernon Police Department, members of the staff of the Los Angeles District Attorney, and two judges of the Superior Court of Los Angeles County. Testimony and affidavits from these persons uniformly denied that Costello expressed such doubts to them. In fact, some of them stated that he seemed quite certain and unshakable in his identification of petitioner. The prosecuting attorney and a police officer testified that they talked to Costello before he testified at the trial to impress upon him the seriousness of his identification and to tell him that there would be no disgrace in withdrawing it if he were unsure. Costello replied: " 'I'm positive. I know it's serious to be wrong. I have been convicted myself of a felony, so I know how serious it is. I'm positive in my identification.' " The referee found "that at no time either before or after the trial of Petitioner Imbler on the charge of murder, which resulted in his conviction, did the witness Alfred Costello express to any representative of the State of California a doubt as to his identification of Petitioner Imbler as testified by the witness Costello."

We adopt both of these findings involving Costello's alleged perjured identification. Although we are not bound by the findings of a referee (*In re Mooney*, 10 Cal.2d 1, 17 [73 P.2d 554], they are entitled to great weight (*In re Riddle*, 57 Cal.2d 848, 853 [22 Cal.Rptr. 472, 372 P.2d 304]; *In re Martinez*, 52 Cal.2d 808, 812 [345 P.2d 449]; *In re Mitchell*, 35 Cal.2d 849, 855 [221 P.2d 689]). After a full hearing, the referee disbelieved most, if not all, of the changes that Costello made in his trial testimony and the charges he made at the reference hearing. He found "that the testimony given by said Alfred J. Costello at the Reference Hearing, which varied from his testimony at the murder trial, was thoroughly impeached and discredited by numerous witnesses, while the testimony of said Alfred J. Costello, as given at the murder trial concerning his identification of Petitioner is

corroborated by the testimony of witnesses Billy Hillen and Alonzo Dunlap, and is consistent with other circumstances in the case. . . ." The referee had the opportunity to observe the witness and judge his credibility and demeanor. (See *In re De LaRoi*, 27 Cal.2d 354, 364 [164 P.2d 10]; *In re Marvich*, 27 Cal.2d 503, 516 [165 P.2d 241].) The transcript of the hearing reveals many ambiguities and inconsistencies in Costello's testimony that convince us that the referee was fully justified in making this finding.

[5] Petitioner alleges that Costello perjured himself when questioned about seeing photographs of petitioner. Costello testified at the reference hearing that petitioner's mug shot was shown to him many times before the lineup where petitioner was identified, and "as I recollect back, there was a little psychology that they used on me by showing me the picture continuously. The image of Imbler, naturally, became imbedded in my mind, and when I saw the man in the lineup, it was a recollection of the picture not of the man that had entered the store. It was a little phychology that they worked." The investigating police officer admitted at the reference hearing that he showed the photograph of petitioner from the Los Angeles Police Department files once to all of the witnesses before the lineup. He presented it with photographs of about a dozen similar-looking men, and each of the witnesses identified petitioner's photograph as that of the killer.

Costello's position on this point is not clear. At the trial, he first stated upon cross-examination that he had not seen any mug shots of petitioner before the lineup; after further questioning, he stated that he was "not positive, but certain" that he had seen mug shots of petitioner in a mug book before the lineup, but that he had kept his identification to himself. At the reference hearing, Costello presented a third version of the facts; he claimed that the police showed mug shots of petitioner to him several times before he helped in making the composite drawing of the killer, which closely resembled petitioner and was admitted into evidence at the trial.

The police denied showing any photographs of petitioner to Costello before the drawing was completed. The composite drawing was completed on January 18, 1961, and the Los Angeles Police Department's files show that petitioner's file, which presumably contained his photograph, was not released to officers investigating the Hasson murder until January 25. Costello testified that some of the mug shots he was shown were taken by the Pomona police when petitioner turned himself in for the January 14 robbery attempt, but the Pomona photographs were not taken until January 17, and the investigating officer from the Los Angeles Police Department testified that he did not receive them until January 20 and never showed them to any of the witnesses. Moreover, it appears that petitioner first came to the attention of the Los Angeles police as a suspect when an officer who had talked to him when he turned himself in for the Pomona robbery saw a resemblance between him and the completed composite drawing. It therefore appears that petitioner's photograph was not shown to Costello before the composite drawing was made.[1]

The referee found that "the witness Alfred J. Costello was not induced by any representative of the State of California to unwittingly or otherwise make a false identification of Petitioner Imbler. . . ." The evidence supports this finding and fails to establish that Costello wilfully gave false testimony at the trial about seeing petitioner's photograph. His testimony at the reference hearing shows that he was confused about when he saw a photograph of petitioner and the form of that photograph. In any event, Costello's testimony at the trial apprised the jury that he may have been "preconditioned" to identify petitioner at the lineup. (Compare *Napue* v. *Illinois*, 360 U.S. 264, 270-271 [79 S.Ct. 1173, 3 L.Ed.2d 1217, 1221-1222].)

[1] An officer of the Vernon Police Department, called by the State to demonstrate Costello's certainty as to his identification, testified that between January 10 and January 15, 1961, Costello told him that he "was able to select one picture of an individual who was the suspect or who did the shooting in this particular case" and that he "was very sure about it." In light of all of the contrary evidence, however, the witness was probably confused as to the date, for he had previously testified that he did not know the date of this conversation because of Costello's frequent visits.

[6a] Petitioner also alleges that several times Costello perjured himself in answering questions involving his credibility. At the trial, Costello was cross-examined about his criminal record and testified that he had only one felony conviction; his "make sheet," introduced at the reference hearing, showed that in fact he had two felony convictions. Costello was also cross-examined about his commitment to state mental hospitals. On redirect examination, he attempted to rehabilitate himself by testifying that since the time of his release from these hospitals, he had received degrees from the University of California (completing a four-year course in two years) and the University of Southern California (receiving an "Engineer's Degree"). This statement was established as false at the reference hearing.

[7] False testimony affecting a witness's credibility is perjured if willfully given (*People* v. *Barry*, 63 Cal. 62, 64-65; *People* v. *Lem You*, 97 Cal. 224, 226-227 [32 P. 11]; *People* v. *Low Ying*, 20 Cal.App.2d 39, 42-43 [66 P.2d 211]),[2] and such testimony would require that the

[2] As to Costello's trial testimony regarding his college education, the referee found "that the foregoing false testimony does not constitute perjury as defined by the Penal Code of the State of California (§§ 118, 125) in that said testimony was not given as to any fact material to the essential issues involved in the trial of Petitioner Imbler." (No finding was made as to Costello's trial testimony regarding the number of his felony convictions.) False testimony concerning the credibility of a witness is material, however, and may be the basis of a conviction for perjury. (*People* v. *Barry, supra; People* v. *Lem You, supra; People* v. *Low Ying, supra.*) Arguably, Costello's educational achievements are technically immaterial to show rehabilitation from insanity, but in a perjury case, "the ordinary test of materiality is whether the testimony given could have probably influenced the tribunal before which the cause was being tried. . . ." (*People* v. *Barry*, 153 Cal.App.2d 193, 209 [314 P.2d 531]; accord *People* v. *Di Giacomo*, 193 Cal.App.2d 688, 699-700 [14 Cal.Rptr. 574]; *People* v. *Macken*, 32 Cal.App.2d 31, 41 [89 P.2d 173]; *People* v. *Dunstan*, 59 Cal.App.574, 584 [211 P. 813].) This testimony "could have probably influenced" the jury to consider Costello rehabilitated after his capacity and competence as a witness had been put into question on cross-examination.

conviction be overturned if representatives of the state had knowledge of its false nature and if it might have affected the outcome of the trial (see *Napue* v. *Illinois*, 360 U.S. 264, 269-270 [79 S.Ct. 1173, 3 L.Ed.2d 1217]; *People* v. *Savvides*, 1 N.Y.2d 554, 557 [154 N.Y.S.2d 885, 136 N.E.2d 853]). [6b] Petitioner, however, failed to prove knowledge of these falsehoods by representatives of the state. No evidence was introduced at the reference hearing to show that any person connected with the prosecution knew of Costello's educational background. The prosecutor examined him about his college degrees on redirect examination only because Costello had informed him that he had several degrees during a recess immediately after the cross-examination. The prosecutor had no reason to disbelieve this information, which was first given to him during the course of the trial, and he had no duty to verify it before using it to rehabilitate his witness. (See *In re Horowitz*, 33 Cal.2d 534, 540 [203 P.2d 513].) Petitioner contends that the prosecutor had Costello's "make sheet," which listed all of his prior convictions, before him at the trial. The referee found, however, that petitioner's counsel had the same "make sheet" in his possession during the trial, yet failed to use it to correct the false testimony. If the prosecutor is to be charged with knowledge of the contents of the "make sheet," so must petitioner. (See *In re Manchester*, 33 Cal.2d 740, 742 [204 P.2d 881); *Taylor* v. *United States*, 229 F.2d 826, 833-834; *Green* v. *United States*, 158 F.Supp. 804, 809; cf. *People* v. *Adamson*, 34 Cal.2d 320, 329 [210 P.2d 13]; *In re Mitchell*, 35 Cal.2d 849, 856 [221 P.2d 689].) [3]

[3] Petitioner also contends that Costello perjured himself on redirect examination when he testified that his commitment to state mental hospitals was "voluntary." It was established at the reference hearing that he was committed under section 1026 of the Penal Code when he was found not guilty of a criminal charge by reason of insanity. Thus, petitioner argues that the commitment was not voluntary, At the trial, however, Costello apparently only meant that he voluntarily pleaded not guilty by reason of insanity. The following question and answer appear in the redirect examination of Costello:

[Footnote continued on page 23]

[8a] Petitioner contends that the testimony given by the police fingerprint expert at the trial was perjured. [9] If any representative of the state connected with the prosecution either gives perjured testimony or knows that other prosecution witnesses have perjured themselves, the writ will issue. It is immaterial that the prosecuting attorney himself did not have knowledge of the perjury. (*Curran* v. *Delaware*, 259 F.2d 707, 713; see *In re De La Roi*, 27 Cal.2d 354 [164 P.2d 10]; *In re De La Roi*, 28 Cal.2d 264 [169 P.2d 363]; *Pyle* v. *Kansas*, 317 U.S. 213 [63 S.Ct. 177, 87 L.Ed. 214]; cf. *In re Mitchell*, 35 Cal.2d 849, 855 [221 P.2d 689]. But see *In re Allen*, 47 Cal.2d 55, 59-60 [301 P.2d 577]. Compare *Brady* v. *Maryland*, 373 U.S. 83, 87-88 [83 S.Ct. 1194, 10 L.Ed.2d 215, 218].)

[8b] The expert testified at the trial that there were two fingerprint fragments on the plastic razor case found in the pocket of the coat dropped by the killer and that neither was sufficiently well defined to be assigned to anyone. At the reference hearing, an expert produced by petitioner testified that there were three fingerprints on the razor case and that although two were too fragmentary to identify, the third could be identified and was definitely not petitioner's. The police expert at the reference hearing at first testified that there were only two fingerprints on the case. Upon examining his photographs of the fingerprints, he corrected himself and stated that there were three. He repeated again that all were insufficient to identify. After being instructed on cross-examination to examine his photographs overnight, how-

[3] [Continued]

"Q. And what were the circumstances of your voluntarily committing yourself?

"A. Well, in '46 and '47 when I was committed to Mendocino, I got in a little trouble with the law and I was represented by the Public Defender's Office at that time, and it was suggested to me that I enter a plea of not reasonably—not guilty by reason of insanity, and I was furnished a copy with the right answers to give the doctors at that time, which caused me to be committed to Mendocino."

ever, he admitted the next day that one could be identified and that it was not petitioner's.

There is certainly an inconsistency in this prosecution witness's testimony at the reference hearing, but it appears that he first came to the conclusion that one of the fingerprints on the razor case could be identified as not being petitioner's during a recess in the hearing itself. There is no indication that he intentionally gave false testimony at the trial as to the number of fingerprints or as to whether they were identifiable. An honest error in expert opinion is not perjury even though further diligence and study might have revealed the error. (See *In re Howell*, 114 Cal. 250, 254 [46 P. 159]; *People* v. *Von Tiedeman*, 120 Cal. 128, 136-137 [52 P. 155]; *In re Lindley*, 29 Cal.2d 709, 723 [177 P.2d 918].)

[10] Petitioner contends, however, that the fingerprint expert was negligent in analyzing the fingerprints and in testifying that they were too fragmentary to identify. He asserts that we should now recognize that the negligent presentation of false testimony is as damaging as the knowing use of perjured testimony and that, therefore, the judgment should be set aside. The issue of the expert's negligence was not presented to the referee; even if we assume, however, that the expert was negligent, his negligence did not deprive petitioner of a fair trial. We have no doubt that negligence of representatives of the state in preparing and presenting a criminal prosecution could in some cases result in a denial of a fair trial. (See *People* v. *Kidd*, 56 Cal.2d 759, 769-770 [16 Cal.Rptr. 793, 366 P.2d 49]; *People* v. *Carter*, 48 Cal.2d 737, 747 [312 P.2d 665]; *United States* v. *Heath*, 147 F.Supp. 877; cf. *Kyle* v. *United States*, 297 F.2d 507, 511; *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563, 570-571.) Police investigators, however, are not infallible, and it is the basic purpose of the trial to determine whether they were correct in asserting the defendant's guilt. Unless their negligence has obstructed the defendant in challenging the case against him, it is not a ground for collateral attack. The razor case and the fingerprints on it were available to petitioner throughout the trial for his own examination. Moreover, proof that someone else had handled the razor case would not have absolved petitioner or conflicted with the evidence against him. The testimony of the police expert did not interfere with the presentation of petitioner's defense, and had petitioner considered it advantageous to present further fingerprint evidence, he could have done so.

Petitioner contends that in several instances the state suppressed evidence favorable to him. Evidence of suppression of material evidence has usually been considered in connection with a claim that the state knowingly used perjured testimony to secure a conviction. (*In re Mooney*, 10 Cal.2d 1, 15 [73 P.2d 554]; *In re Lindley*, 29 Cal.2d 709, 722 [177 P.2d 918].) [11] Moreover, suppression by the state of material evidence alone deprives a defendant of due process of law. (*In re Razutis*, 35 Cal.2d 532, 535 [219 P.2d 15]; *Brady* v. *Maryland*, 373 U.S. 83, 87 [83 S.Ct. 1194, 10 L.Ed.2d 215, 218], affirming 226 Md. 422, 427 [174 A.2d 167]; *United States ex rel. Almeida* v. *Baldi*, 195 F.2d 815, 820 [33 A.L.R.2d 1407].) [12] Petitioner contends that the police prevented the appearance of one witness favorable to him and "quietly pushed" him out of Los Angeles before the trial. This witness, James Fritz, was standing near Billy Hillen when the killer rushed by, encouraged Hillen and Costello to stop him, and joined Costello in chasing him, but he did not testify at either the preliminary hearing or the trial. The referee found that this contention "is utterly barren of evidentiary support in the record. I find that the record herein demonstrates that unusual diligence was exercised by the representative of the State of California to procure the attendance of Mr. Fritz as a witness at the murder trial of Petitioner Imbler." The police testified that at the time of trial, they were unable to locate Fritz after a thorough search, and no one has yet been able to find him. Moreover, petitioner's assumption that this witness would have been favorable to the defense is doubtful in light of the card introduced at the hearing, signed by Fritz at the police lineup, identifying petitioner as the killer.

[13] Petitioner contends that the police suppressed the fact that a co-employee of petitioner was unable to identify the coat dropped by the killer. This failure to identify the coat was merely one of many fruitless attempts to connect petitioner to the physical evidence in the case. Evidence of these failures would have been merely negative evidence of little probative value and could not have affected the outcome of the case. (See *Palakiko* v. *Harper*, 209 F.2d 75, 95; cf. *United States* ex rel. *Thompson* v. *Dye*, 221 F.2d 763, 769 [concurring opinion].)

[14] Petitioner contends that the state suppressed the fact that investigating police knew that Costello had issued several checks that were returned because of insufficient funds between the killing and the trial. The referee found, however, that "no threats of any character were made to Costello with regard to the aforesaid worthless checks." The evidence at the hearing shows that the police did not consider this information significant; no charges were made because of the issuance of these checks, and none were ever proposed. Neither before nor at the trial did petitioner request discovery of any of the evidence he now claims was suppressed. (See *Brady* v. *Maryland*, 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215]; cf. *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563; *Kyle* v. *United States*, 297 F.2d 507.) [15] Although representatives of the state may not suppress substantial material evidence, they are under no duty to report sua sponte to the defendant all that they learn about the case and about their witnesses.

[16] Petitioner contends that there is new evidence that undermines the proscution's entire case. (See *In re Lindley*, 29 Cal.2d 709, 723 [177 P.2d 918]; *Jones* v. *Kentucky*, 97 F.2d 335, 338; cf. *Durley* v. *Mayo*, 351 U.S. 277, 291 [76 S.Ct. 806, 100 L.Ed. 1178, 1188] [dissent].) Some of this new evidence has already been mentioned: Costello's testimony at the reference hearing that petitioner is not the man he chased and the new expert testimony that a fingerprint found among the personal effects of the killer is not petitioner's. Moreover, Costello cast doubt on the testimony of the prosecution's other witnesses by testifying that one of them was in no position to make an identification when he saw the killer and that the other was intoxicated. Petitioner also presented several witnesses at the reference hearing to corroborate his alibi defenses. Two additional persons testified that petitioner first met Lingo, who was identified as one of the two men involved in the January 4 killing, on January 14; two additional witnesses testified that they accompanied petitioner in making the rounds of various Los Angeles taverns on the night of the killing.

Much of this evidence was thoroughly discredited at the reference hearing. As to Costello's recanting, the referee found "that while the testimony of the witness Alfred J. Costello, given at the Reference Hearing, is '. . . impeached in so many ways as to defy lucid presentation' . . ., his testimony given at Petitioner's trial for murder is supported and corroborated." Thus, Costello charged that Dunlap, the parking lot attendant who identified the killer at the trial, was so intoxicated at the time of the crime that he could not make an identification. This charge was rebutted by Dunlap's employer, who testified that he had never known this witness to drink on the job although he had checked the lot daily for three years, and by a police officer who testified that Dunlap did not appear to have been drinking when questioned on the scene.

All of the witnesses who testified at the reference hearing that they were with petitioner on the night of the killing were shown on cross-examination to be uncertain of the exact date, and some of the witnesses who testified that petitioner first met Lingo on January 14 were impeached through prior inconsistent statements. Moreover, the testimony supporting both of the alibis was merely cumulative to testimony at the trial, for both of petitioner's alibis were corroborated there, although by a close friend who was his accomplice in the January 14 robbery attempt.

In *In re Lindley*, *supra*, 29 Cal.2d 709, which also involved a conviction based entirely upon identification tes-

timony, a new suspect was discovered after the trial and a former autopsy surgeon testified that the victim had died of a heart attack. We held that such new evidence did not justify relief, and the same conclusion must be drawn here. In this case, as in *Lindley*, the new evidence "does not point unerringly to [petitioner's] innocence," but "presents only a conflict with the evidence which was before the jury" and "affords only a basis for speculation or conjecture." (29 Cal.2d at p. 724.)

Nor can a writ of *coram vobis*, which petitioner seeks in the alternative, issue on the basis of this new evidence. [17] The writ of *coram vobis* is essentially identical to the writ of *coram nobis* except that the latter is addressed to the court in which the petitioner was convicted. (*In re Lindley*, 29 Cal.2d 709, 726 [177 P.2d 918].) [18] These writs will be granted only if petitioner can "show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the judgment." (*People* v. *Mendez*, 28 Cal.2d 686, 688 [171 P.2d 425]; accord, *People* v. *Reid*, 195 Cal. 249, 255 [232 P. 457, 36 A.L.R. 1435]; *In re Lindley*, *supra*, at p. 724-726; *People* v. *Tuthill*, 32 Cal.2d 819, 821 [198 P.2d 505].) No such showing his been made.

[19] Petitioner contends that he was denied adequate representation by counsel because of the absence of an effective investigation in his behalf. (Compare *In re Ochse*, 38 Cal.2d 230, 231 [238 P.2d 561]. See generally Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendant*, 47 Minn.L.Rev. 1054.) The services of the Los Angeles Public Defender's investigative staff were available, however, and an investigator worked on the case. At no time during the trial did counsel indicate that additional investigative services were needed or ask for additional time to conduct an investigation. The only support for the claim that the investigation was inadequate was the fact that an investigation after the trial by the Adult Authority and the district attorney's staff turned up additional alibi witnesses that the defense had been unable to find. Whatever may be the scope of the

right to adequate and effective investigation, it does not require that the investigation produce all evidence that can be shown by hindsight to have been available.

[20] Petitioner contends finally that the trial judge erred in informing the jury in response to a juror's question of petitioner's right to an automatic appeal to this court in the event that they should impose a death penalty. The trial court failed to admonish the jury of their sole responsibility for imposing a sentence or to explain to them the nature and scope of this court's review. The jury was informed of the automatic appeal only after consent of both parties had been obtained, however, and this objection was not raised either at the trial or on the appeal.

The order to show cause is discharged and the petition is denied.

Gibson, C. J., Schauer, J., McComb, J., Peters, J., Tobriner, J., and Peek, J., concurred.

Petitioner's application for a rehearing was denied December 30, 1963.

UNITED STATES DISTRICT COURT
C. D. CALIFORNIA

Civ. No. 68-1543-F

PAUL KERN IMBLER, PETITIONER,

v.

WALTER E. CRAVEN, Warden of Folsom State Penitentiary, State of California, RESPONDENT

April 23, 1969.

Habeas corpus proceeding by state prisoner. The United States District Court, Ferguson, J., held that state defendant's right to due process of law was violated, and cumulative effect of errors was not harmless, where prosecution permitted witness to give material testimony which prosecution knew or should have known was false, suppressed an exculpatory fingerprint, and failed to disclose negative evidence indicating that coat, which prosecution claimed was worn by defendant, was not defendant's.

Petition granted conditionally.

* * * *

Roger S. Hanson, Woodland Hills, Cal., for petitioner.
Thomas C. Lynch, Atty. Gen., Thomas S. Kerrigan, Deputy Atty. Gen., Los Angeles, Cal., for respondent.

FERGUSON, District Judge.

Petitioner, a California state prisoner, seeks a writ of habeas corpus under 28 U.S.C. § 2254, challenging the validity of a judgment of conviction in two counts entered in the Superior Court in Los Angeles on August 10, 1961. The first count charged murder in the first degree, for which the jury fixed the penalty at death; in addition, petitioner was sentenced to a term of imprisonment not to exceed ten years on count two, assault with a deadly weapon with intent to commit murder. The

judgment was affirmed by the California Supreme Court on automatic appeal [Calif.Pen.Code § 1239(b)]. People v. Imbler, 57 Cal.2d 711, 21 Cal.Rptr. 568, 371 P.2d 304 (1962). Thereafter, petitioner sought a writ of habeas corpus in the California Supreme Court. The writ was denied on the basis of a referee's findings following an evidentiary hearing. In re Imbler, 60 Cal.2d 554, 35 Cal.Rptr. 293, 387 P.2d 6 (1963), cert. denied, 379 U.S. 908, 85 S.Ct. 196, 13 L.Ed.2d 181 (1964).

Petitioner then filed a second petition for a writ of habeas corpus in the state courts challenging solely the penalty of death. During the penalty phase of petitioner's trial, the prosecution stated to the jury that life imprisonment, because of the possibility of parole, did not necessarily mean permanent incarceration. The trial court instructed the jury that it could consider the possibility of parole after seven years' imprisonment in determining the penalty. Holding these statements and instructions to be improper, the California Supreme Court reversed the judgment imposing the death penalty. In re Imbler, 61 Cal.2d 556, 35 Cal.Rptr. 293, 387 P.2d 6 (1964). On remand, petitioner was sentenced to life imprisonment on the murder count.

The federal petition was originally heard in the Eastern District of California. The District Court there denied the petition, holding it to be premature under McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1931), since petitioner was also serving concurrent sentences under independent convictions not then being challenged. The Court of Appeals for the Ninth Circuit reversed the denial following the United States Supreme Court's overruling of McNally v. Hill, *supra*, in Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968). Imbler v. Oliver, 397 F.2d 277 (9th Cir. 1968). Thereafter, the case was transferred to this District pursuant to 28 U.S.C. § 2241(d).

The petition for a writ of habeas corpus is conditionally granted for the reasons set forth herein.

I

[1] A federal evidentiary hearing on petitioner's claims was not held since the same contentions were presented in the writ of habeas corpus before the California Supreme Court. A referee appointed by that court conducted a full and adequate hearing, and since there is no major dispute as to the basic facts, this court need not conduct a further hearing. Townsend v. Sain, 372 U.S. 293, 318, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); Jackson v. California, 336 F.2d 521, 522 (9th Cir. 1964).

The complete reporters' transcripts of petitioner's trial and of the state habeas corpus hearing, as well as the referee's report thereon, are part of the record herein and have been fully considered by this court.

II

About 8:30 on the evening of January 4, 1961, two men entered a Los Angeles grocery store owned by Morris Hasson. Mr. Hasson was, at the time, kneeling behind the counter. His wife, then also in the store, approached the apparent customers; by that time, Mr. Hasson had risen with a peculiar look on his face by which, his wife testified, she knew something was wrong. When she started to question him, she observed a gun barrel protruding from the coat of one of the men. As she asked what the men wanted, the gun was fired, killing Mr. Hasson. The two men walked out of the store and headed in opposite directions, the gunman walking west.

Mrs. Hasson testified that the killer was wearing a hat and coat, and that she did not see his face and could not identify him. She subsequently identified the accomplice as one Leonard Lingo.

There was no physical evidence whatsoever connecting petitioner with the crime. The most significant evidence was the testimony of one Alfred Costello, called by the prosecuting attorney the "People's principal witness".

Mr. Costello testified that about 8:30 in the evening involved he was directly across the street from the Hassons' grocery store when two men in the store, one wearing a dark coat and a "slouched down" hat, attracted his

attention. Costello stated he heard a shot and, as he walked across the street, he attempted to intercept the killer who he then noticed was holding a gun. At this point he was eight to twelve feet from the man, who then made a right-hand turn heading west. Costello identified him as petitioner. Costello testified that he followed the killer about 25 feet into an alley. The killer started to run, losing his hat. He hesitated, then entered a parking lot. Costello then yelled, "Stop or I'll shoot". The killer turned and fired at Costello who, standing 15-20 feet away, heard the bullet pass him and strike against a building. The killer then ran through the parking lot and finally into a third parking lot, Costello still following. Near the attendant's office of that lot, the man discarded his coat, then doubled back through the alley and toward Hasson's store. Costello temporarily lost sight of him, then spotted him again going into a Y.M.C.A. building. Thereafter, Costello returned to the parking lot to recover the coat, and discovered the gun and a razor case in a pocket.

In addition, there was testimony from one Billy Hillen, who was leaving the Hassons' store as the killer and his accomplice were entering it. The men passed within four or five feet of Hillen. Hillen testified that petitioner was one of the men, wearing a brown overcoat and green hat, and that Lingo was the other. When he was about six or seven steps outside the store, Hillen heard a shot and turned back. He stated that petitioner was by that time standing outside of the store as Costello and a man named Fritz approached. Fritz said "jump him", but Hillen, who saw the gun, said to let him go.

The following day, Hillen recovered the hat worn by the killer.

Alonzo Dunlop, the third eyewitness, was an attendant in one of the parking lots through which the killer had run. Dunlop testified that he saw petitioner walk through his lot that night about 8:50 p.m. He said he heard no gunshots, although Costello stated the killer had fired at him in one of the adjacent parking lots. The only unusual sound he testified he did hear was the scream of Mrs. Hasson, and this only after the killer

had left his lot. He further testified that he knew Costello by sight, but had not seen him in the lot that evening.

Ten days later, on January 14, 1961, petitioner, Leonard Lingo and one Jerry Mayes attempted an armed robbery of a service station in Pomona, California. Lingo died as the result of a traffic accident following the attempted robbery and Mayes was captured. Petitioner subsequently surrendered to the Pomona police.

Attempting to solve the Hasson murder case, the Los Angeles police showed Mrs. Hasson photographs of Lingo. She identified Lingo as the man who accompanied the murderer of her husband.

On January 30, 1961, prior to the trial, witnesses Costello, Hillen, Dunlop and Fritz were taken to a lineup. The lineup was conducted in four or five groups, with ten to twelve men in each group. When Hillen saw petitioner in the last group, he stated out loud, in the hearing of the other witnesses, "That's him". Hillen admitted making that statement, Dunlop testified as to it, and Costello also heard such a comment. Petitioner was then identified by the witnesses. Nevertheless, Hillen requested to see him wearing the hat and coat recovered from the vicinity of the murder. Several of the men were required to don the clothes, although there is some dispute as to whether any of them were similar in build to petitioner, and Hillen again identified petitioner.

Petitioner's defense was an alibi. He testified that he and three other persons, along with his girl friend for part of the evening, visited about five drinking or dancing establishments, which he either named or described, from about 5:30 p.m. until after midnight on the day the murder occurred. He was able to identify fully only two of his companions: Jerry Mayes, who also testified about those activities although he found it difficult to be certain about the exact date, and one Robert Mahon. Also in the group were a man petitioner thought was named George, in whose car the group travelled from one place to another, and petitioner's girl friend, Ann, whose last name he could not recall.

In addition, while petitioner admitted to his participation in the Pomona robbery, he denied knowing Lingo before the 14th. He testified, as did Mayes, that the first time he and Mayes met Lingo was in the early morning of the 14th, the introductions having been made by a man named Dale who was not located at the time of trial.

Subsequent to the trial, investigation produced further corroboration by new witnesses both of petitioner's alibi and of his statement with regard to his first meeting with Lingo on January 14, ten days after the murder. The prosecution made these facts known to the Governor's office and the California Adult Authority (the state parole board), stating that "investigation has revealed a consistency in Imbler's position which is now corroborated by others". The man named Dale, who introduced petitioner and Lingo on January 14, had been found, and the owner of the car in which the drinking rounds were made on January 4th, whom petitioner thought was named "George", was also located and corroborated the alibi.

III

Petitioner alleges that prejudicial error occurred during testimony of the witness Costello primarily, but not exclusively, involving that witness' credibility.

One instance of such error is claimed to be in the following testimony:

> "Q [By defense counsel] * * * Did you see any mug shots, as they are called, or small pictures of the defendant that you remember—Mr. Imbler—before you went to a line up?
> "A [By Costello] No.
> "Q Did the officers bring you out and show you a number of pictures?
> "A Well, I looked through the mug books, which is customary, I think.
> "Q You did look through a mug book?
> "A Yes.
> "Q You saw a number of pictures then of different people as possible suspects?
> "A Yes.

"Q And among them were you able to find anybody that caused you to think this might be the person among the mug shots?

"A Yes, but I kept that to myself. I didn't reveal it at that time.

"Q Did you see any mug shots of the defendant particularly?

"A I believe I did."

Thus, in Costello's testimony there appears a possible contradiction as to whether he saw pictures of petitioner prior to the lineup. However, it is possible to interpret the testimony, and the jury may well have so interpreted it, as meaning that Costello did not see any mug shots of petitioner before the lineup, and was shown the "mug book" only after the lineup had already taken place. In fact, both Costello and Hillen were shown photographs of Petitioner on January 25, 1961, five days prior to the lineup. Such pictures were not part of a "mug book", but were shown along with some twelve or so other pictures. At that time, on January 25th, Costello did not keep his identification to himself; rather, both he and Hillen identified Imbler as a "good possible suspect". Therefore, to the extent that Costello answered that he had not been shown pictures of Imbler, or at least did not see them apart from any "mug books", he was not telling the truth. At least one of the police officers involved in the investigation, who knew of petitioner's pictures being shown to the witnesses, was always present in the courtroom during the trial; yet no attempt was made to correct this inaccuracy. Although this court cannot conclude that Costello willfully perjured himself on this issue, it is clear that his answer was false and that the state, having knowledge of such falsity, permitted it to stand.

The witness Hillen similarly testified:

"Q [By defense counsel] * * * Did the officers show you at any time some small pictures of different men to see if you could pick out a man from some pictures?

"A [By Hillen] I looked at the mug books. That's standard procedure."

Again:

"Q * * * [D]id you ever see any pictures of the defendant, if you remember?

"A Not that I remember."

As indicated above, this answer was also false, and the state had knowledge of such falsity.

Further false testimony was given by Costello on matters relating to attempted impeachment of his testimony. In the following testimony on redirect examination, the prosecutor led Costello to testify concerning a previous "voluntary commitment" to a state mental hospital, when in fact the commitment had been mandatory upon a court adjudication of insanity:

"Q [By District Attorney] Did you voluntarily commit yourself in 1946 to any of these state hospitals?

"A [By Costello] Yes, I did.

"Q And what were the circumstances of your voluntarily committing yourself?

"A Well, in '46 and '47 when I was committed to Mendocino, I got in a little trouble with the law and I was represented by the Public Defender's Office at that time, and it was suggested to me that I enter a plea of not reasonably—not guilty by reason of insanity, and I was furnished a copy with the right answers to give the doctors at that time, which caused me to be committed to Mendocino."

Costello denied on the stand that he had been adjudicated insane, although both the prosecutor and defense counsel knew the denial to be false from a "make sheet" each had in his possession. That denial, however, was sticken in order to allow the court to hear legal argument on the propriety of the inquiry. When Costello was subsequently asked if he knew, of his own knowledge, whether the commitment was based upon a finding of insanity, the prosecution's objection was sustained and the witness

was not permitted to answer. The jury had already, however, heard Costello's denial, albeit subsequently stricken.

Thus, the prosecutor, by leading the witness in regard to a *voluntary* commitment, not only introduced erroneous testimony, but also succeeded in preventing the truth from being introduced.

At the state habeas corpus hearing, the prosecuting attorney testified that, so far as he could remember, he did not see the "make sheet" on Costello prior to trial. Just before Costello had taken the stand, the prosecutor had a short conversation with him, at which time Costello told him of the 1951 felony conviction; he did not at that time say anything about hospital commitments. The prosecutor further testified that he saw the "make sheet" for the first time when the public defender showed it to him before cross-examination of the witness. After seeing the "make sheet", he again talked with Costello, confronting him with the new facts. Costello then admitted to various mental hospitalizations, but told the prosecuting attorney that the 1946 admission was a *voluntary* commitment because he [Costello] had voluntarily pleaded innocent by reason of insanity knowing that the result would be hospitalization. Having had before him the "make sheet" that stated that Costello had been "found insane now and at time of crime committed to Mendocino", the prosecutor testified about the discussion with the witness:

> "Mr. Costello told me that he was voluntarily committed. He gave me the reasons why he thought it was a voluntary commitment. Rather than argue with him, I just accepted his own wording by his statement that he pleaded not guilty to—by reason of insanity and was furnished certain answers by the Public Defender. In his mind, he thought it was a voluntary commitment. I wan't going to argue with him. Let him explain it to the jury. The jury could make the decision. That was my attitude."

It therefore appears that the prosecutor in fact knew the commitment had not been voluntary, but, in deference to the witness, he not only refrained from using the term involuntary, but used the opposite and clearly

erroneous term. Thus, whether he intended to do so or not, the prosecuting attorney knowingly created an incorrect impression of the most critical aspect of the commitment.

In addition, during cross-examination defense counsel attempted to elicit testimony of Costello's criminal record.

> "Q [By defense counsel] Mr. Costello, have you ever been convicted of a felony?
> "A [By Costello] Yes, I have. I am glad you asked that question.
> "Q And that was in 1951, was it?
> "A That's right.
> "Q And another one in 1955, is that true?
> "A No. You are wrong.
> "Q Just one felony conviction, 1951?
> "A That's right."

The "make sheet" which the prosecutor saw prior to the cross-examination indicated at least one other felony conviction to which defense counsel referred in the above testimony, and possibly others. However, on redirect examination, rather than correcting the false statement, the prosecutor perpetrated it:

> "Q [By prosecutor] Now, you said that you were convicted of a felony in 1951. What felony was that?
> "A [By Costello] Forgery."

The prosecutor admitted in the state hearing that he did not pursue, in his conversation with Costello prior to redirect examination, the leads suggested by the "make sheet." Thus, while the "make sheet" alone suggested that Costello might be a six-time felon, the prosecution "believed" Costello's statement that he was convicted only once. In summary, Costello's testimony concerning his felony convictions was false, and the prosecutor had information that it was false yet declined to introduce the truth.

On redirect examination of Costello, in an attempt to rehabilitate the witness, the prosecution elicited the fol-

lowing testimony, having previously been advised by Costello of it:

> "Q [By prosecutor] Now, then after your release from any of these hospitals, did you attend any universities or schools?
> "A [By Costello] Yes, I did. I completed two years of my university training—a four year course in two years—and received a degree from the University of California.
> "Q And what type of degree was that?
> "A Industrial relations, and later on I went to night school at SC, and received an Engineer's degree.
> "Q When was it that you received the Engineer's degree?
> "A '54."

Costello further testified that his earnings for the past four years had "averaged around nine to ten thousand a year".

Such testimony was admittedly false. The prosecutor, however, at the state habeas corpus hearing, testified that, at the time of the trial, he did not know it to be false, and, having just been advised by Costello of that information during the recess, did not have sufficient time to verify it.

Petitioner contends that the prosecution *must* have known that this testimony, which it elicited, was false. He further argues that only through gross negligence could the prosecutor have failed to conclude that the testimony was perjured. If in fact the prosecutor did fail to draw that conclusion, petitioner argues that the state should nevertheless be charged with it. It is clear that the state had knowledge during the trial of the following facts about Costello:

> 1. That Costello had at least three previous convictions;
> 2. that in addition to his convictions he had been arrested on forgery and bad check charges on numerous occasions;

> 3. that he was committed to Mendocino State Mental Hospital on an adjudication of insanity in March, 1946;
> 4. that he was recommitted to Mendocino State Mental Hospital in February or March, 1949;
> 5. that he spent time in Camarillo State Mental Hospital in 1947 or 1948;
> 6. that at the time of trial there was a charge pending against him in Highland Park, California, for passing a bad check;
> 7. that at the time of trial there were outstanding checks to Mrs. Hasson and to the hotel at which he was staying for which there were either insufficient funds or no bank account; and
> 8. that he was in prison under a 1951 conviction until November, 1953, although testifying that by 1954, one year after he was released from prison, he had received two degrees from two universities.

With actual knowledge of these facts, or at least having them directly before him, the prosecutor elicited from Costello the testimony that the witness received a university degree in industrial relations, completing a four-year degree in one-half the normal time, and a second full degree in engineering, a totally new and different academic subject, at a university night school within a year after his release from prison.

In addition, Costello was allowed to testify that for the past four years his earnings averaged nine to ten thousand dollars a year, when in fact that prosecution knew that Costello had recently written bad checks for relatively small amounts, of which some were still outstanding and one of which was the basis of a pending criminal proceeding.

The police learned of these facts during their investigation of the case. Moreover, aside from their knowledge or communication thereof to the prosecuting attorney, the existence of the pending charge was also independently known to the prosecuting attorney. During a recess of the trial, he talked to two police officers from Highland Park who said they wanted to speak with Cos-

tello about the charge, and he asked them to wait until Costello was finished with his testimony. The prosecutor's final attempt at rehabilitation came just three questions after he referred to the witness' single admitted prior conviction (although the prosecution knew there had been more than one conviction):

> "Q [By prosecutor] Incidentally, since you have been in trouble with the law have you been trying to straighten yourself out?
> "A [By Costello] Very much so."

This testimony was elicited despite the fact that the prosecutor knew of the pending Highland Park charge, had possession of Costello's "make sheet" which indicated at least two subsequent offenses and a subsequent charge of parole violation, and had available knowledge of or actually knew of the other currently outstanding bad checks.

[2] It is clearly established that a criminal conviction obtained through the prosecution's knowing use of perjured or false evidence violates the defendant's right to due process of law as protected by the Fourteenth Amendment to the federal constitution. Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935). See also, *e.g.*, Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967); Naupe v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); Hysler v. Florida, 315 U.S. 411, 62 S.Ct. 688, 86 L.Ed. 932 (1942); Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942); Evans v. Eyman, 363 F.2d 540, 542 (9th Cir. 1966).

There is no doubt that false testimony was given at petitioner's trial by Costello in the following respects: as to whether Costello

> (1) saw petitioner's mug shots prior to the lineup,
> (2) was voluntarily or involuntarily committed to Mendocino State Mental Hospital in 1946,
> (3) had previously been convicted of more than one felony,

> (4) attended any universities or obtained any degrees therefrom subsequent to his release from the mental hospitals and from prison,
> (5) earned an average of $10,000 a year for the four years preceding the trial, and
> (6) had been trying to "straighten" himself out since he had been "in trouble with the law".

Further false testimony was given with respect to the mug shots from the witness Hillen.

[3, 4] In order, however, for such false testimony to warrant the relief here sought, it must have been material to the case. The court finds that the six enumerated items of false testimony were in fact material. The first item, relating to Costello's seeing petitioner's picture prior to the lineup, was material to the vital issue of identification. Each of the other items was material to the witness' credibility. It is no longer open to question that such materiality is within the constitutional rule set forth above. The Supreme Court conclusively settled that issue in Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959):

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence * * *."

The Court there cited with approval the following passage from People v. Savvides, 1 N.Y.2d 554, 557, 154 N.Y.S.2d 885, 887, 136 N.E.2d 853, 854-855:

> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."

See also, Giles v. Maryland, supra 386 U.S. at 74, 87 S.Ct. 793, and Loraine v. United States, 396 F.2d 335 (9th Cir.), cert. denied, 393 U.S. 933, 89 S.Ct. 292, 21 L.Ed.2d 270 (1968). The Court of Appeals in this Circuit has stated:

> "Evidence available for use at the trial may be material within the meaning of this rule, even though it goes only to the credibility of a witness."

Loraine v. United States, supra at 339.

Cases granting relief for failure to make disclosure of evidence or for use of false evidence relating only to credibility are numerous. For example, in Powell v. Wiman, 287 F.2d 275 (5th Cir. 1961), the prosecution successfully objected to the introduction of any evidence of its key witness' mental condition, although it knew the witness had previously been in mental hospitals; that fact was not known to the defense. Such conduct was held to be a violation of the prosecution's duty. In Ingram v. Peyton, 367 F.2d 933 (4th Cir. 1966), the court held that the prosecution's apparently unintentional misnaming of its chief witness denied petitioner of a fair trial since it prevented his attorney from discovering the witness' prior criminal record, a matter relating solely to credibility.

See also, United States ex rel. Hill v. Deegan, 268 F. Supp. 580 (S.D.N.Y. 1967), where the key prosecution witness was presented as an honorably discharged veteran who, in addition, was receiving pension as a wounded veteran. This portrait of a good citizen tended to minimize the rather substantial variations that occurred in the witness' testimony. Although at the time the prosecution did not know those facts were false, the court found that the prosecution already had reason to be wary of the witness' testimony. In addition, the prosecution had knowingly allowed certain additional false testimony to be given, which it allowed to stand until the witness himself corrected it. The *Deegan* case is similar to the one here in that the witness was permitted to create for himself a respectable, albeit false, background. Judge Frankel, in granting the petition for a writ of habeas corpus, remarked of the witness, "His gratitous injection

of these unchecked lies adds to the blemishes in an already infested record". 268 F.Supp. at 591. The same may be said in this case. Costello's testimony of his two degrees, his engineering position, and his $10,000 a year job was bound to have some effect in mitigating his less admirable, but factual, past history of which the jury was partially apprised. Thus, although only the witness' credibility was involved (except as to the mug shots), it was in this case extremely significant. It must be remembered that no physical connection between petitioner and the crime was ever established, causing the convictions to rest solely upon witnesses' identification of petitioner.

[5] It is, therefore, readily apparent that the evidence here involved was material within the meaning of the rule. The California Supreme Court also concluded, for example, that Costello's testimony of his college education was material, although the state referee had concluded otherwise. That court stated that on the question of perjury the test of materiality is whether the perjured testimony "could have probably influenced" the trier of facts. The court concluded that, "This testimony 'could have probably influenced' the jury to consider Costello rehabilitated after his capacity and competence as a witness had been put into question on cross-examination". In re Imbler, 60 Cal.2d 554, 564-565 n. 2, 35 Cal. Rptr. 293, 298, 387 P.2d 6, 11 (1963). This test of materiality is consistent with the general law as recognized by the federal courts; that is, whether the false testimony is capable of influencing the trier of facts. See, *e.g.*, Luna v. Beto, 395 F.2d 35, 38 (5th Cir. 1968); United States v. Parker, 244 F.2d 943, 950-951 (7th Cir. 1957), cert. denied, 355 U.S. 836, 78 S. Ct. 61, 2 L.Ed.2d 48 (1957); Blackman v. United States, 108 F.2d 572 (5th Cir. 1940).

Respondent argues that another element of this rule also prevents its application to the instant case: knowledge of the falsity of such evidence on the part of the prosecution. Respondent does not seriously dispute the falsity of Costello's statements. Instead, it is argued that the prosecution, in effect, acted in good faith and without knowledge that such testimony was false. Lacking

such knowledge, the state contends it cannot be responsible for any perjured testimony. This court does not agree.

It should be noted at this point that while it is true that the Supreme Court cases have as yet discussed only the "knowing" use of perjured testimony, there is authority for the proposition that one convicted on the basis of perjured testimony has been deprived of due process even when the prosecution was unaware of the perjury. In Jones v. Kentucky, 97 F.2d 335 (6th Cir. 1938), it was held that a state is constitutionally required to provide a corrective remedy upon discovery of the perjury, and, absent such a remedy, federal habeas relief will be granted. There the state courts had held they lacked jurisdiction to grant the relief sought. The prosecutor did not know at the time of the trial that the testimony was false, and there was no suggestion that he should have known. Nevertheless, the United States Court of Appeals granted relief. See also, Smith v. Warden, Maryland Penitentiary, 254 F.Supp. 805 (D. Md. 1966); United States ex rel. Montgomery v. Ragen, 86 F.Supp. 382, 390 (N.D.Ill. 1949).

The position that a criminal conviction founded in part upon perjured testimony cannot be constitutionally permitted to stand whether such perjury is discovered prior or subsequent to trial, is therefore not without authority. The prejudice resulting to a defendant so convicted is not eliminated by the state's ignorance. Nor can it seriously be contended that there is absent any "state action", necessary to invoke the Fourteenth Amendment's protection, in the procuring of a state criminal conviction.

It should also be noted that the Supreme Court has, in its supervisory capacity over the federal courts, held that a new trial is required when it is discovered subsequent to trial that a key government witness in a federal criminal case was not reliable. Mesarosh v. United States, 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed. 2d 1 (1956). The motion in that case had been made by the government. The Court recognized that ordinarily a defense motion for a new trial alleging new evidence which is "merely cumulative or impeaching" will not afford defendant a new trial.

But in that case, as here, the witness' unreliability is conceded by all parties, and it is not a case of mere cumulative evidence. The Court, in *Mesarosh*, stated:

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial.
>
> * * * *
>
> "The government of a strong and free nation does not need convictions based upon such testimony. * * * The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial." [352 U.S. at 9, 14, 77 S.Ct. at 5, 8.]

This rule has been applied in the case of a collateral attack upon a federal conviction (via 28 U.S.C. §2255 motion), Mitchell v. United States, 368 U.S. 439, 82 S.Ct. 462, 7 L.Ed.2d 429 (1962) (per curiam), and the California Supreme Court has been urged to adopt it by at least one justice of that court. People v. Riser, 47 Cal. 2d 566, 593, 305 P.2d 1 (1956) (Carter, J., dissenting), cert. denied, 353 U.S. 930, 77 S.Ct. 721, 1 L.Ed.2d 724 (1957), appeal dismissed, 358 U.S. 646, 79 S.Ct. 537, 3 L.Ed.2d 568 (1959).

It is, however, under *Mesarosh*, still a rule applied only in the Supreme Court's supervisory capacity over federal trials, and despite the Court's statement that "there can be no other just result than to accord petitioners a new trial", the Court has not yet held that a different result would not comport with due process.

[6] Thus, the current law in this Circuit, contrary to the holding in Jones v. Kentucky, 97 F.2d 335 (6th Cir. 1938), is that "knowledge" by the prosecution is required to support a claim of denial of due process based upon the existence of prejudicial perjured testimony in a criminal trial. Marcella v. United States, 344 F.2d 876, 880 (9th Cir. 1965), cert. denied, 382 U.S. 1016, 86 S.Ct. 630, 15 L.Ed.2d 531 (1966); Black v. United States, 269 F.2d 38, 43 (9th Cir. 1959), cert. denied, 361 U.S. 938,

80 S.Ct. 379, 4 L.Ed.2d 357 (1960); Taylor v. United States, 221 F.2d 228 (9th Cir. 1955). This court need not consider the propriety of a departure from that rule since it finds the facts in this case to fall within it.

As set forth above, Costello's testimony was materially false in at least six respects. As to his false statement that he was "voluntarily" committed to a certain state hospital in 1946, when in fact he was committed because he had been adjudicated insane, this court finds that the prosecuting attorney had actual and definite knowledge that such statement was false. He not only permitted that statement to stand, an act itself expressly prohibited by Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), but he purposely and intentionally led the witness to make it. Twice in his questioning, the prosecutor himself referred to the commitment as "voluntary", although his testimony at the hearing establishes that he indeed knew better. His justification for using that terminology, to be consistent with the witness' understanding of the situation, finds no basis in the law. Where a prosecutor knowingly permits false evidence to be introduced in a trial and such evidence will inevitably create a false impression in the minds of the jury, no legal justification for that misrepresentation can exist. If the prosecutor wished to avoid for the sake of convenience the term "involuntary", he could have readily done so; there was absolutely no necessity for a substitute adjective, and use of an erroneous one was highly improper. The prosecutor also stated that he intended to let the jury "decide" with respect to the voluntariness of the commitment, having presented to them the "facts". The one fact, however, which he had, and which the jury did not, was that the commitment was not voluntary.

[7] Nor can it be said that there was at least some question about the nature of the commitment, and that the jury, having the "facts", was competent to judge the issue. It is not only affirmative misrepresentations which the prosecutor is prohibited from employing to secure a conviction; omissions and half-truths are equally damaging and prohibited and their use is no less culpable. Jackson v. Wainwright, 390 F.2d 288, 298 (5th Cir. 1968).

Creating an inference that a fact exists when in fact to the knowledge of the prosecution it does not, constitutes the knowing use of false testimony. *E.g.*, Turner v. Ward, 321 F.2d 918-921 (10th Cir. 1963).

"Evidence may be false either because it is perjured, or, though not itself factually inaccurate because it creates a false impression of facts which are known not to be true." Hamric v. Bailey, 386 F.2d 390, 394 (4th Cir. 1967). The court, in *Hamric*, recognized that the witnesses giving false testimony may have innocently done so through a lack of perception. Nevertheless, the state knew such testimony to be false, and failed to bring the true facts to the jury's attention. The conviction was held to violate the Fourteenth Amendment.

[8] The prosecution here also had knowledge of the fact that both Hillen and Costello had seen pictures of petitioner prior to the lineup. Such knowledge is conclusively indicated by the police log. One of the investigating police officers was present at the trial. Even assuming that the prosecuting attorney himself did not have such knowledge, the application of the rule is not precluded, for the prosecution is charged with the knowledge of its agents including the police. This principle is no longer subject to serious dispute. As it was held in Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842, 846 (4th Cir. 1964):

> "Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor."

The court there held that if the police failed to make proper disclosure, they were participating in the deception. Unlike the situation in Luna v. Beto, 395 F.2d 35, 40 (5th Cir. 1968), which distinguished its facts from those in *Barbee*, an investigating police officer in the case here was present in the courtroom, and was able to hear the testimony given. He could easily have corrected any misstatements of fact, or have brought the same to the

prosecutor's attention. His action is no less that of the state than the actions of a prosecuting attorney. The contention that knowledge of perjured testimony must in fact be "brought home to the prosecuting officers" was expressly rejected in Curran v. Delaware, 259 F.2d 707, 712-713 (3d Cir. 1958), cert. denied, 358 U.S. 948, 79 S.Ct. 355, 3 L.Ed.2d 353 (1959), the court resting its decision upon Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). It is clear that the term "prosecution", for this purpose, includes at least the investigating officers as well as the attorneys. See also United States v. Consolidated Laundries Corp., 291 F.2d 563, 570 (2d Cir. 1961), where even the conduct of government clerks was held to result in denial of due process; Estes v. United States, 254 F.Supp. 314, 318 (W.D.Tex. 1966).

The fact that Costello had been convicted of more than one felony was also known to the prosecuting attorney. He admittedly examined the witness' "make sheet", which indicated *at least* two others. At the state hearing the prosecutor somewhat evasively testified that he had examined the "make sheet", but stated he had looked at it "as a whole", and not to its specific parts. Respondent cannot deny knowledge of facts which it had before it and which its agent admittedly examined. That the agent may have ignored those facts does not relieve the state of its responsibility. This is not mere negligence in failing to ascertain the facts. It is, at best, deliberate failure to take full notice of their significance. Thus, this case is vastly different from Taylor v. United States, 229 F.2d 826 (8th Cir.), cert. denied, 351 U.S. 986, 76 S.Ct. 1055, 100 L.Ed. 1500 (1956), in which petitioner attempted to charge the prosecution with "implied" knowledge of the contents of certain Narcotics Bureau records which allegedly would have refuted what a witness told Narcotics Agents. Here, petitioner need not rely on the mere existence of official records. The facts with which respondent is charged were either in fact known to the prosecuting attorney, the investigating officers, or were contained in documents which the prosecutor had actually examined.

By virtue of the same principles, the prosecution had reason to believe that Costello had not been attempting to "straighten out". Therefore, by asking Costello whether he had been so doing, the prosecutor knowingly attempted to create an impression in the minds of the jurors which he knew was false. For example, as discussed above, the prosecutor personally knew of the pending bad check charge against Costello. In addition, he had examined the witness' "make sheet" which indicated, among other things, two offenses and a parole violation in the period of time involved, and the police officer (who had been present at the trial) knew of additional bad checks issued by Costello that were still outstanding.

The final items of Costello's false testimony are the references to the witness' two alleged university degrees and his claimed annual income. This court has above described the facts known by the prosecutor about Costello. For a man with a history of felony convictions and state mental hospital commitments, such a success story is highly suspect, particularly when coupled with the known fact that Costello had been in prison until November of 1953, and yet he claimed to have received his second degree, through night school, at a university in 1954. This rather incredible story was given in full to the jury as the result of leading questions by the prosecutor.

[9] While the prosecutor claimed not to have disbelieved these outright lies, he clearly had cause to suspect them. The reckless use of highly suspicious false testimony is no less damaging or culpable than the knowing use of false testimony, and a conviction based upon such evidence must suffer the same consequence.

Although there are no cases directly holding that testimony which should have been known to be false falls within the prohibition against the knowing use of perjured evidence, a number of cases have directed their inquiries based upon that principle. Thus, for example, in McCloskey v. Boslow, 349 F.2d 119, 121 (4th Cir 1965), it was held that the allegation that the prosecuting attorney should have known that certain testimony was perjured raises factual issues and "legal questions concerning the state's responsibility for the accuracy of what Dr. Bos-

low said". Again, in Wild v. Oklahoma, 187 F.2d 409, 410 (10th Cir. 1951), the court recognized this principle in finding that:

> "In the case before us there is no suggestion that the prosecuting officers knew or had reason to believe that any of the testimony offered at the trial of the petitioner was false or perjured."

See also Smith v. Warden, Maryland Penitentiary, 254 F.Supp. 805 (D.Md. 1966).

Moreover, in cases where evidence favorable or helpful to the defense has been withheld, due process has consistently been held to be violated even if the evidence is only negligently withheld. That rule was stated in Thomas v. United States, 343 F.2d 49, 53-54 (9th Cir. 1965):

> "The well-recognized rule thus invoked is that a conviction cannot stand where a prosecutor has, either wilfully or negligently, withheld material evidence favorable to the defendant. As the Second Circuit said [in United States v. Zborowski, 271 F.2d 661, 668 (2d Cir. 1959)]:
>
> " 'The prosecutor must be vigilant to see to it that full disclosure in made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried.' "

See also, *e.g.*, Ingram v. Peyton, 367 F.2d 933 (4th Cir. 1966); Levin v. Katzenback, 124 U.S.App.D.C. 158, 363 F.2d 287 (1966); Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964); United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir. 1961); United States v. Birrell, 276 F.Supp. 798, 817-818 (S.D.N.Y. 1967); United States v. Soblen, 203 F. Supp. 542 (S.D.N.Y. 1961), aff'd, 301 F.2d 236 (2d Cir.), cert. denied, 370 U.S. 944, 82 S.Ct. 1585, 8 L.Ed.2d 810 (1962); United States v. Heath, 147 F.Supp. 877 (D. Hawaii 1957), appeal dismissed, 260 F.2d 623 (9th Cir. 1958) (approving the district court's holding) (the *Birrell* and *Heath* cases involving apparently inadvertent loss of certain documents).

It would hardly be logical, in light of those cases, to hold a prosecutor to a lower degree of diligence with respect to the introduction of false evidence.

[10] Nevertheless this court need not now decide whether mere negligence in allowing this false testimony to be given would warrant the relief here sought. In this case, more than mere negligence has been established. The prosecutor either had reason to believe or in fact knew that each item of evidence discussed above was untrue. The state cannot now disclaim knowledge of such falsity on the ground that its agent, the prosecutor, ignored the facts before him or that the investigating officers failed to disclose those facts to him. Due process of law does not tolerate a prosecutor's selective inattention to such significant facts. It requires that he exercise good faith in prosecuting that case. Such good faith is not fulfilled where the prosecutor allows his witness to give false testimony of which he has advance knowledge and the accuracy of which he has reason to suspect. The duty of good faith is not merely a negative one, to omit from one's case outright lies. It imposes as well an affirmative duty to avoid even unintentional deception and misrepresentation, and in fulfilling that duty the prosecutor must undertake careful study of his case and exercise diligence in its preparation, particularly where he is confronted with facts tending to cast doubt upon his witness' testimony. The prosecutor's objective is justice; his role is not that of a mere advocate. The goal of justice is hardly satisfied by less.

[11] Therefore, as to each of the six items of false testimony described above, the court finds that the prosecutor had knowledge of such falsity, or, if he did not have actual knowledge, that he had reason to believe such testimony was false and his reckless use thereof in disregard of such reason is to be treated the same as knowing use of false testimony.

IV

[12] Respondent's position is that any errors allegedly committed by the prosecution could have been cured by action of defense counsel. Thus, it is argued that if Cos-

tello's testimony, for example, of his university education was suspect, defense counsel should have cross-examined the witness on that issue. It is clear that defendant's public defender should have done so. Nevertheless, his failure to do so will not bar relief. A criminal trial is not a sporting event nor a game of wits. See, *e.g.*, Giles v. Maryland, 386 U.S. 66, 100 87 S. Ct. 793, 810, 17 L. Ed.2d 737 (1967) (Fortas, J., concurring):

> "A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim."

See also Levin v. Katzenback, 124 U.S.App.D.C. 158, 363 F.2d 287, 291 (1966); Curran v. Delaware, 259 F.2d 707, 711 (3d Cir. 1958), cert. denied, 358 U.S. 948, 79 S.Ct. 355, 3 L.Ed.2d 353 (1959).

[13-15] It is true, as respondent urges, that the prosecution is not required to prepare defendant's case. See United States v. Gleason, 265 F.Supp. 880, 884 (S.D.N.Y. 1967). Nevertheless, the failure of defense counsel to conduct an effective Cross-examination, unless a deliberate trial tactic, cannot cure constitutional, prejudicial error committed by the prosecution. The fact that a more diligent counsel might have cured that error does not negate it. See Levin v. Katzenback, 124 U.S.App.D.C. 158, 363 F.2d 287, 291 (1966). See also the concurring opinion of Justice White in Giles v. Maryland, 386 U.S. 66, 82, 87 S.Ct. 793, 801 (1967), wherein he noted that, "Had petitioner's counsel been *less* diligent, the false testimony might rise to the level of a *Napue* violation" (emphasis added). This is not a case such as United States v. Sobell, 142 F.Supp, 515 (S.D.N.Y. 1956), aff'd, 244 F.2d 520 (2d Cir.) cert. denied, 355 U.S. 873, 78 S.Ct. 120, 2 L.Ed.2d 77 (1957), where it may be said that defense counsel's failure to cross-examine a witness with respect to a particular issue was a matter of specific and deliberate strategy for which defendant, upon hindsight, cannot now complain.

V

Petitioner further contends that the prosecution suppressed certain exculpatory fingerprint evidence contained

on a razor case. The case was found in the coat discarded by the killer. At the trial, a police fingerprint expert testified that he found two fragmentary prints on the case, but that they were not sufficient to permit a comparison with any other prints. He stated that there was more than one point of identification in each fragment "constituting possible three or four points", but that at least ten points are needed for an identification. In addition, he agreed with the prosecutor's statement that if he did have a fingerprint exemplar, it would not have done "any good" because he didn't have a sufficient fragment.

After the trial, an expert working on petitioner's behalf discovered a *third* fingerprint on the razor case. The third print was positively identifiable and is admitted not to be petitioner's. All the evidence indicates that this print was in fact on the case at the time of trial.

At the state habeas corpus hearing, the police fingerprint expert was reluctant to admit to the existence of the third print. He first testified that, as he "recalled", there were two fingerprints on the razor case. Upon viewing the case, however, he added, "In my testimony a moment ago I said that there were two. I see that there are three, actually." When asked whether the third print could be identified, he stated that he didn't "believe so". He further testified, after viewing an unmagnified photograph of the print, that he was unable to say whether or not the print was petitioner's. Exemplars of petitioner's prints were then given to him during noon recess at which time he compared them with a *magnified* photo of the third print. His testimony about that second examination was somewhat evasive:

> "Q [By petitioner's counsel] [D]id I show you at noon the prints of Mr. Imbler that were made by Mr. Meyers, I believe it was, the other day?
>
> "A [By police fingerprint expert] Yes, I glanced at them.
>
> "Q Did you look at them and compare them with the photograph of the print appearing on the inside of the razor case?
>
> "A No. I didn't make an accurate comparison.

"Q Did you make enough of an examination to draw a conclusion as to whether or not the magnified photograph is one of the prints appearing on the exhibits that were prepared by Mr. Meyers?

"A I would say that they weren't.

"Q Well, did you make enough of an examination to form an opinion then?

"A That is a more or less casual opinion. As I say, I didn't compare it with a magnifying glass, but I would say that they weren't, generally."

Thus, while the state's expert was unable to make a definite statement with regard to the unmagnified pictures, he was able to conclude, albeit reluctantly, that the print as it appeared in the magnified photo was not petitioner's. After later examining the prints during an overnight recess, he finally made a clear and unqualified statement that the third latent print was not petitioner's.

His testimony raises an additional problem. He stated that the first two latent prints were too fragmentary to be of "any good", even if compared with exemplars. Nevertheless, he did in fact make such comparisons, as admitted in his testimony and shown by police logs of the investigation.

Thus, the function apparently served by fingerprint testimony was to imply to the jury that thep rints on the razor case *might* have been petitioner's. Had the jury known that the third print on the case was not petitioner's, they clearly would have reached a different conclusion with respect to this evidence.

[16, 17] The court finds that evidence of the third fingerprint was suppressed. The referee at the state hearing found, however, that such evidence was equally available to defendant at the trial. The California Supreme Court adopted that conclusion, stating in addition that although in some cases the negligence of one of the state's representatives may result in a denial of a fair trial, in this case it did not. The court stated that "[the police investigators'] negligence has obstructed the defendant in challenging the case against him, it is not a ground for collateral attack", and added that the razor case had been available to petitioner during the trial. In

re Imbler, 60 Cal.2d 554, 567, 35 Cal.Rptr. 293, 387 P.2d 6 (1963). This court respectfully disagrees.

"The suppresssion by the prosecution at the trial, of evidence favorable to an accused violates due process where the evidence is material either as to guilt or punishment, irrespective of the good or bad faith of the prosecution [citations omitted]."

Loraine v. United States, 396 F.2d 335, 339 (9th Cir.), cert. denied, 393 U.S. 933, 89 S.Ct. 292 21 L.Ed.2d 270 (1968). See also Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967).

[18] There can be no doubt that had evidence of the third print been deliberately suppressed by the police, even if the prosecuting attorney was not aware of its existence, due process would clearly have been violated. See, for example, Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964), where the police had suppressed the results of fingerprint and ballistics analyses which tended to cast doubt upon whether the gun allegedly used was in fact the murder weapon. The same result follows if the material is negligently suppressed.

As our Court of Appeals has stated in Thomas v. United States, 343 F.2d 49, 53 (9th Cir. 1965):

"[A] conviction cannot stand where a prosecutor has, either willfully or negligently, withheld material evidence favorable to the defendant."

As to negligent suppression, see also the cases cited *supra* p. 808.

VI

Costello testified that as the killer fled he discarded his coat, which Costello later recovered and turned over to police. At the trial, the recovered coat was identified by Mrs. Hasson, as well as by Costello and Hillen as that worn by the killer.

Prior to trial, police exhibited the coat to a fellow worker of petitioner who testified at the state habeas cor-

pus hearing that he had told police he had never seen petitioner wearing such a coat, or anything like it. This evidence, petitioner contends, should have been disclosed to him.

The California Supreme Court stated that this evidence, tending to prove that the coat was not petitioner's, "would have been merely negative evidence of little probative value and could not have affected the outcome of the case". In re Imbler, 60 Cal.2d 554, 568, 35 Cal.Rptr. 293, 301, 387 P.2d 6, 13 (1963).

The state, at oral argument, explicitly conceded that failure of the prosecution to disclose this evidence to the defense was error. The same admission is made by implication in the remarks of the California Supreme Court. However, the state contends that such error was harmless.

[19, 20] The federal harmless error test, to be applied to constitutional errors, requires, as noted below, in order to find such an error harmless, that the court be able to declare it harmless beyond a reasonable doubt. Because no physical connection between the tangible evidence and petitioner was made, and because the jury was prevented from hearing any testimony tending to negate any such connection, although such testimony was available, such a declaration in this case is impossible. To hold otherwise would be to indulge in pure speculation, and would be a clear violation of the federal standards. See, for example, United States ex rel. Hill v. Deeban, 268 F. Supp. 580, 591 (S.D.N.Y. 1967).

The court similarly dispenses with the argument that such evidence concerning the coat was equally available to petitioner. The record in this case nowhere indicates that petitioner even knew of the coat's existence before it was introduced at the trial. If petitioner is in fact innocent, he would not have known there was a coat involved, and it was therefore, for all practical purposes, not available to him. See Lee v. United States, 388 F.2d 737 (9th Cir. 1968).

VII

[21] Petitioner has raised substantial questions concerning his rights at the pre-trial lineup procedure during which he was identified. See, *e.g.*, Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969). However, this court need not rule upon those contentions in light of its decision on the other issues. Moreover, petitioner has failed to exhaust his state remedies on these grounds, and this court therefore declines to consider their merits.

VIII

The harmless error doctrine, as applied to federal constitutional error, is set forth in Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967):

> "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

Although the Supreme Court stated it was merely adhering to the test provided in Fahy v. Connecticut, 375 U.S. 85, 86, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963) (whether there was a reasonable possibility that the evidence might have contributed to the conviction) its restatement of the rule in fact appears to be more stringent. It should be noted that *Chapman*, *supra*, was not decided until after the California Supreme Court's adverse determination of petitioner's claims.

[22] The California Supreme Court is without question at the forefront of advancing and protecting the constitutional rights of the accused. Although this court cannot give a state court's conclusions of law as to federal constitutional questions binding effect, Townsend v. Sain, 372 U.S. 293, 318, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), determinations of the California Supreme Court in this field have earned much respect and deserve great weight. Nevertheless, this court must draw independent conclusions of law, and, in light of the United States Supreme Court's recent restatement of the federal harm-

less error rule, it must respectfully disagree with the California court.

[23, 24] The total and cumulative result of all the constitutional errors committed at petitioner's trial prohibits a declaration that, beyond a reasonable doubt, those errors were harmless. This court finds upon review of the record of the entire trial that petitioner was denied a fair trial, and that his federally protected right to due process of law was thereby violated. Even if evidence of petitioner's guilt were overwhelming, the right to a fair trial may not be abrogated. Jackson v. California, 336 F.2d 521, 523 (9th Cir. 1964).

Therefore, this court concludes that the harmless error doctrine does not save petitioner's conviction.

IX

ORDER

It is the order of the court that unless the State of California shall institute proceedings within 60 days from the date this order becomes final to retry the petitioner, a writ of habeas corpus will be granted by this court.

It is further ordered that the court reserves jurisdiction over the parties in regard to this cause.

It is further ordered that the clerk this day shall serve copies of this order by United States mail upon the Attorney General of the State of California, the respondent, petitioner and his counsel, the District Attorney of Los Angeles County, the Honorable Joseph A. Wapner, Presiding Judge of the Superior Court of Los Angeles County, and the Honorable William B. Keene, Presiding Judge of the Criminal Courts Department of the Superior Court of Los Angeles County.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 71-123-RJK

PAUL KERN IMBLER, PLAINTIFF

vs.

RICHARD PACHTMANN, D. W. LIGHTNER, S. MCCALEB, D. SEARS, K. SCARCE, E. GARCIA, DEFENDANTS

FIRST AMENDED COMPLAINT FOR VIOLATION OF CIVIL RIGHTS AND MONEY DAMAGES WITHIN THE MEANING OF TITLE 42, UNITED STATES CODE SECTIONS 1981-1988

COMES NOW, the plaintiff PAUL KERN IMBLER, by and through his attorney ROGER S. HANSON, and complains against the defendants RICHARD PACHTMANN, DE WITT LIGHTNER, SANFORD McCALEB, DONAL H. SEARS, KENNETH SCARCE, and ECTOR A. GARCIA for violations of plaintiff's civil rights, withing the meaning of Title 42, United States Code Sections 1981-1988, inclusive, and the decisions of the United States Court therein interpreting said statutes, including but not limited to that certain decision of the United States Court of Appeals for the Ninth Circuit in *Robichaud* vs. *Ronan*, 351 F.2d 533, October 8, 1965, and that certain decision of the Supreme Court of the United States of America in Jim Garrison to dismiss a civil rights suit brought against him under 42 United States Code Section 1983 on the ground that the said Garrison as a District Attorney enjoyed full immunity. The defendants PACHTMANN, LIGHTNER, McCALEB, SEARS, SCARCE and GARCIA acted individually and at other times collectively and conspiratorially at various times commencing in January of 1961 and continuing thereafter at various times and by their acts of malfeasance, misfeasance, nonfeasance, negligence, and failure to

inform and convict while under a duty to do so, planned and individually and/or collectively acted in concert to deprive plaintiff of his liberty by unlawfully charging him with murder and assault with intent to commit murder, and convicting him of the foregoing, all of which caused plaintiff to be sentenced to death in the lethal gas chamber at the California State Prison at San Quentin, detaining him on Death Row for some four (4) years, and thereafter detaining him of his liberty under a life sentence for the above crimes, while nearly causing his death by lethal gas on two definite occasions. At said times they well and good and truly knew that their acts of deliberate malfeasance, misfeasance, nonfeasance, failure to inform and correct while under a duty so to do were a breach of their duty as Deputy District Attorney in the case of RICHARD PACHTMANN, and as officers of the police department of the City of Los Angeles in the case of the other defendants herein sued under 42 U.S.C. 1981-1988.

Plaintiff brings this suit under Title 42 of the United States Code, Section 1981-1988 inclusive and other relating sections of the United States Code involving the Federal Civil Rights Acts, and the Decisions of the United States District Courts, the United States Circuit Courts, and the Supreme Court of the United States, and the 14th Amendment to the United States Constitution.

Plaintiff PAUL KERN IMBLER herewith incorporates that certain decision of the UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, JUDGE WARREN J. FERGUSON, reported at 298 F. Supp. 795, made final by Order of said Court on or about January 5, 1971, entitled PAUL KERN IMBER vs. OLIVER and the STATE OF CALIFORNIA, 68-1545-F, and the decision of the UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT affirming said decision, and the decision of the UNITED STATES SUPREME COURT entered on or about October 16, 1970, denying an attempt to obtain a grant of a Writ of Certiorari filed by the Attorney

General of the State of California, by Albert Harris, Esquire, Deputy Attorney General, as if the same were set forth hereat in haec verba, and the same are herewith plead as part and parcel of the instant complaint for violation of the Civil Rights of the plaintiff PAUL KERN IMBLER.

Because of the acts of the defendants and each of them, this plaintiff has suffered loss of money, loss of consortium of his family, wife, children, and other relatives, loss of freedom for some ten years, has suffered grievous mental cruelty and loss of his opportunity to lead a gainful and fruitful life as a citizen of the United States, all to his damage in the monetary sums to be set forth below in the prayer. Plaintiff has incurred monetary obligations to attorneys in efforts made by said attorneys to secure him his freedom and to correct the illegal acts of the defendants, and each of them, as set forth below in the prayer.

I

At all times mentioned hereinafter, and commencing in January, 1961, the defendant RICHARD PACHTMAN was a duly acting and appointed deputy district attorney of Los Angeles, assigned as Counsel for the People of the State of California, and as an individual and in concert with other defendants hereinafter named, individually and conspiratorially, and with intent, and on other occasions with negligence, acted to deprive plaintiff of a fair and just trial in the Superior Court of the State of California for the County of Los Angeles conducted in 1961 before the Honorable Mark Brandler, then a Judge of said Superior Court, wherein the charge against this plaintiff was murder and assault with intent to commit murder, for which plaintiff was convicted and sentenced to death by lethal gas in the San Quentin Prison Gas Chamber. As set forth in the decision reported at 298 F. Supp. 795, the defendant RICHARD PACHTMAN performed acts of malfeasance, misfeasance, failure to inform and correct, knowingly used testimony at the said trial via witnesses he produced for the people, wherein said testimony, or some of it, was per-

jured, and the said RICHARD PACHTMAN knew of the perjured nature of said testimony and failed to correct and halt the same from being utilized to convict this plaintiff.

During plaintiffs trial as set forth above, defendant RICHARD PACHTMAN was in possession of a "make-sheet", or "rap-sheet" of one Alfred John Costello, a witness called by the prosecution, which showed truly well that said Alfred John Costello was a multi-convicted felon, having been formally sentenced to state facilities for the criminally insane, and the defendant RICHARD PACHTMAN knew that the said Costello has been and had been an inmate of said facilities for the criminally insane by virtue of committing the said Costello therein by order of various Courts of the State of California; that the said Alfred John Costello had been found Not Guilty by Reason of Insanity of Certain Felonies and as a result thereof had been committed to State facilities for the criminally insane at times prior to May of 1951; that the said Alfred John Costello had been continuously an inmate of the California State Prison at San Quentin from May 1951 thru November of 1953; that the said tenure of May 1951 thru November of 1953 was for the crime of Robbery in the First Degree; all of which was known to the said RICHARD PACHTMAN; that at the 1961 trial of this plaintiff as set forth above, the said Alfred John Costello was utilized and called by the said RICHARD PACHTMAN as a witness for the People against this plaintiff, then a defendant, in the case of People of the State of California vs. Paul Kern Imbler, and with the knowledge and the sanction of the said RICHARD PACHTMAN, the said Alfred John Costello did then and thereat testify with falsity and with perjury against this plaintiff, PAUL KERN IMBLER, and said false and perjurious testimony was material in that it made the said Alfred John Costello a more believable witness against the plaintiff and aided in the rehabilitation of the said Alfred John Costello before the jury; and with the knowledge of the fact that said testimony was false, perjurious, misleading and untrue, the said RICHARD PACHTMAN did nothing to correct the same

and acquiesced in same, and the entirety of the same was presented to the jury, and the said RICHARD PACHTMAN did acquiesce in the use of said false and perjurious testimony and aided and abetted in its promulgation while having the power and the duty to correct same, and did the foregoing acts within his capacity as an agent of the County of Los Angeles and also as an individual, and did the same in concert with the defendants DE WITT LIGHTNER and SANFORD McCALEB, both of whom were duly acting police officers of the City of Los Angeles, and the same constitutes a conspiracy to deprive this plaintiff of his civil rights and a fair and just trial within the meaning of the 14th Amendment to the constitution of the United States of America and Title 42 of the United States Code, Section 1981-1988; and the above allegations have been found to be true and correct by the United States District Court at 298 F. Supp. 795 ff.

In particular, the said RICHARD PACHTMAN allowed the said Alfred John Costello to testify falsely in that the said Alfred John Costello was allowed to testify before the jury that the said Alfred John Costello had voluntarily committed himself to mental hospitals when in truth and in fact that said Alfred John Costello had been committed to State Hospitals for the criminally insane as a result of prosecutions of the said Alfred John Costello for felonies in the Superior Court of Los Angeles County in the years 1946-1949 or thereabouts; the said RICHARD PACHTMAN knew well and true that the said Alfred John Costello was intermittantly an inmate of said institutions for the criminally insane during 1946-1951 and in fact had not voluntarily committed himself thereto. The said failure to correct the foregoing material testimony and the knowing use of the foregoing perjured testimony deprived this plaintiff of a fair and just trial within the meaning of the decisions of the United States Supreme Court in *Miller* vs. *Pate*, —— US ——, and the decisions cited in 298 F. supp. 795 by the United States District Court, in that it made the said Alfred John Costello a believable, rehabilitated witness and aided and abetted the State of California to falsely

convict this plaintiff of murder and related crimes, all within the meaning of 42 United States Code, Sections 1981-1988 and the 14th Amendment to the United States Constitution.

As a second overt act, the said RICHARD PACHTMAN allowed the said Alfred John Costello to falsely and perjuriously testify as follows: that the said Alfred John Costello was a graduate of the University of California School of Business, completing a four year bachelors program in two years; that thereafter the said Alfred John Costello matriculated at the College of Engineering of the University of Southern California at Los Angeles, where the said Costello received a degree in Engineering, a totally different academic subject, performing said educational feat in night school, and receiving said second degree in 1954; that at the time the said Alfred John Costello claimed he attended the University of California and the University of Southern California the said RICHARD PACHTMAN knew by way of the "make-sheet" of Alfred John Costello that the said Costello was either within the confines of the State Hospital for the criminally insane or was an inmate at the California State prison at San Quentin for armed robbery in the First Degree, serving at San Quentin continuously from May of 1951 thru November of 1953; that was physically, mathematically, and educationally impossible as shown by the "make-sheet" of the said Alfred John Costello to complete a four-year business program at the University of California followed by a four year engineering degree conducted wholly at "night-school" at the University of Southern California College of Engineering and graduate in 1954 therefrom, while simultaneously being confined within the State Facility for the criminally insane prior to May of 1951, or at the California State Prison at San Quentin from May of 1951 thru November of 1953; that the said RICHARD PACHTMAN utilized and induced said perjured testimony with possession of the said "make-sheet" of said Alfred John Costello in an effort to rehabilitate the said Costello and make the said Costello a believable witness against this plaintiff, PAUL KERN IMBLER; that the testimony ad-

duced by the said RICHARD PACHTMAN from the said Costello was material, false and perjurious and was a deprivation of the Civil Rights of this plaintiff within the 14th Amendment to the United States Constitution and the constitution of the State of California. The said failure to correct the knowing use of perjured testimony deprived this plaintiff of a fair trial within the meaning of the decisions of the United States Supreme Court in *Miller* vs. *Pate*, supra., and the decision of the United States District Court reported at 298 F. Supp. 795, and said testimony was false and material in that it made the described Alfred John Costello a more believable witness against this plaintiff.

In this second overt act, RICHARD PACHTMAN directed Los Angeles Police Officers SANFORD McCALEB and DE WITT LIGHTNER to not disclose the true facts to the attorney for plaintiff, nor did PACHTMAN at any time after plaintiff's conviction attempt to set aside plaintiff's conviction and directed police thereafter to make no revelation of the truth.

As a third overt act, the said RICHARD PACHTMAN, in conspiratorial collaboration with two officers of the Los Angeles Police Department, with the knowledge and help of the defendants SANFORD McCALEB, DE WITT LIGHTNER, who directed the said officers to come to Court, allowed the said Alfred John Costello to testify under oath at the trial of this plaintiff for murder in 1961 that the said Alfred John Costello was now "going straight" and "was having no further trouble with the law", when in truth and in fact the said RICHARD PACHTMAN had requested the said two officers of the Los Angeles Police Department to refrain from arresting the said Alfred John Costello in the Courtroom at plaintiff's trial until he, RICHARD PACHTMAN, concluded using the said Alfred John Costello as a witness against this plaintiff, PAUL KERN IMBLER; that the said Los Angeles Police Officers were present outside the courtroom where this plaintiff was being tried for murder, having been sent there by the codefendants DE WITT LIGHTNER and SANFORD McCALEB, to arrest the said Alfred John Costello for check forgeries and uttering

of false instruments and sending the same into the flow of commerce; that the said police officers advised the said RICHARD PACHTMAN of their purpose, whereupon the said RICHARD PACHTMAN directed the said police officers to withhold the arrest of the said Alfred Costello until he, the said RICHARD PACHTMAN concluded using the said Costello as a witness against this plaintiff, PAUL KERN IMBLER, all within the meaning of *Robichaud* vs. *Ronan*, 351 F. 2d 533; that immediately thereafter the said RICHARD PACHTMAN induced Alfred John Costello to testify falsely and perjuriously that the said Costello had "had no further trouble with the law" since the said Costello had concluded his confinement in the state facility for the criminally insane, while in truth and in fact, the said PACHTMAN knew of the impending arrest for false utterances of checks, and directed Los Angeles Police to not arrest Costello, and knew of the conviction and sentence of the said Costello to the State Prison at San Quentin from May of 1951 thru November of 1953. The foregoing constituted a conspiracy on the part of the said RICHARD PACHTMAN and the Los Angeles Police Department and constituted the said PACHTMAN acting in the role of a policeman and a director of police activity within the meaning of *Robichaud* vs. *Ronan*, 351 F. 2d 533, and knowingly deprived this plaintiff of his constitutional rights to a fair and just trial before the Superior Court of Los Angeles County, as interpreted and found by this Court in 298 F. Supp. 795.

As additional overt acts, the said RICHARD PACHTMAN suffered false and perjurious testimony to be elicited from the said Alfred J. Costello concerning the viewing of pre-trial photographs of this plaintiff, as set forth in 298 F. Supp. 795; the same may be said concerning the prosecution witness Billy Hillen, and the said PACHTMAN knowingly used false testimony therein in concert with the Los Angeles Police, and in particular the co-defendants SANFORD McCALEB and DE WITT LIGHTNER, who were present in the Courtroom during the trial of this plaintiff and failed to correct the false, material, and perjurious testimony adduced from the witnesses Billy Hillen and Alfred John Costello, and the same allegations have already been found to be true by the United States District Court in 298 F. Supp. 795 ff. The foregoing acts of the defendants RICHARD PACHTMAN, SANFORD McCALEB, DE WITT LIGHTNER, and two other Los Angeles Police Officers constitute a conspiracy to deprive this plaintiff of his rights under the 14th Amendment, a violation of Title 42 of the United States Code, and were done by said defendants with knowledge of the perjury, with PACHTMAN acting in the role of a police officer, and the same defendants failed to correct same, while being under a sworn duty to so do. In addition, the said SANFORD McCALEB and DE WITT LIGHTNER possessed personal knowledge of the false check uttering activities of the said Alfred Costello, having personal knowledge that the said Costello had passed phony checks to Mrs. Hasson, wife that survived the alleged murder of the decedent in this case, and the same Costello was under investigation for same, and the defendants LIGHTNER and McCALEB failed to correct these perjurious lies.

In addition, other overt acts as set forth in 298 F. Supp. 795 were engaged in by the said RICHARD PACHTMAN, and served to deprive this plaintiff of his rights to a fair and just trial.

At all times during the said trial, and at times during the pre-trial investigatory phase thereof, the said RICHARD PACHTMAN, directing police officers in traditionally exclusive police activity, was aided by officers doing acts within their agency for the Los Angeles Police Department, defendants SANFORD McCALEB and DE WITT LIGHTNER, and the same knew of the foregoing material facts concerning the said Alfred J. Costello, and the same police officers McCALEB and LIGHTNER were at various times present in the Courtroom and acquiesced in the knowing use of perjured testimony, and the same relationship between defendants PACHTMAN, LIGHTNER and McCALEB constituted a plan and conspiracy to deprive this plaintiff of his rights to a fair and just trial within the meaning of the 14th Amendment to the United States Constitution.

1. The said RICHARD PACHTMAN, in acting as a police officer and directing police officer is not immune from suit under 42 United States Code, Section 1983, within the meaning of the decision of the Supreme Court in *Monroe* vs. *Pape*, 365 U.S. 167 (1961), and

2. The said RICHARD PACHTMAN is not immune from suit as a District Attorney within the meaning of 42 United States Code, Section 1983 because the said RICHARD PACHTMAN has already been found guilty by the United Sates District Court for the Central District of California, Honorable Warren J. Ferguson, 298 F. Supp. 795, the Federal authority allows a 42 United States Code, Section 1983 law suit where there is not risk of harassing the said RICHARD PACHTMAN, who has already been found guilty, within the meaning of *Gregoire* vs. *Biddle*, 177 F. 2d 579, 581, C.C.A. 2d. Circuit, per Honorable Learned Hand, who stated, regarding an alleged "quasi-judicial immunity" of a prosecuting attorney"

> "It does indeed go without saying that an official, *who is in fact guilty* of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and *if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery.*'
>
> 'The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried (as it has been here tried by Judge Warren J. Ferguson), and that to submit all officials, the innocent as well as the *guilty*, to the burden of a trial and to the inevitable *danger* of its outcome, would dampen the ardon of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hardput to satisfy a jury of his good faith."

and

3. The said RICHARD PACHTMAN can not seek dismissal of the complaint under 42 United States Code, Section 1983 under alleged district attorney immunity in view of the decisions of the United States Supreme Court in *Jim Garrison, District Attorney of Orleans Parish, New Orleans, Louisiana* vs. *Chief Judge John R. Brown* of the United States Court of Appeals 5th Circuit, March 20, 1972, which denied a motion to compel dismissal within the meaning of 42 United States Code, Section 1983, the meaning of 28 United States Code, Section 1651, and the meaning of the Interlocutory Appeals Act, 28 USC 1292(b), on a certified question:

> "May plaintiff (CLAY SHAW) maintain this action against the defendant District Attorney (JIM GARRISON) for the Parish of Orleans, who acted on the approval of a three-judge court and a grand jury indictment, in prosecuting plaintiff for a New Orleans-based conspiracy to assassinate the President of the United States, and against those lay citizens who are alleged to have acted with the District Attorney in furthering his investigation of the assassination solely by furnishing funds to him for that purpose?"

Plaintiff incorporates by reference those orders and documents in *Garrison* vs. *Brown*, herewith as Exhibit "A" to this Complaint.

For each of the foregoing three reasons and allegations, plaintiff PAUL KERN IMBLER does sue and does maintain this suit under 42 United States Code, Section 1983 against District Attorney defendant RICHARD PACHTMAN in his role as District Attorney, and as his role as a police officer, director of police officers, and as a District Attorney who has already been found to have violated plaintiff, PAUL KERN IMBLER's civil rights by this Court at 298 F. Supp. 795, and this suit is therefore maintainable under Federal Authority, *Gregoire* vs. *Biddle*, 177 F. 2d 579, Cert. denied, 399 U.S. 949.

The findings of 298 F. Supp. are binding, having been affirmed by the 9th Circuit and certiorari denied by the Supreme Court of the United States in October, 1970.

II

At all times herein mentioned, the defendant DONAL H. SEARS was a duly qualified expert in the field of fingerprint identification and an agent of the police department of the City of Los Angeles, and did investigatory work at the trial and prior thereto of this plaintiff, and thereafter at an evidentiary hearing before the Honorable Thomas White, Justice of the State Supreme Court; the said SEARS testified under oath that there existed certain fingerprint evidence taken from a Gillete safety razor case, and a revolver; that said fingerprint evidence was too fragmentary to ascribe to anyone; that there were three to four points of similarity and identification in existence, but such was de minimis and could not serve to identify the owner of said prints; such testimony was wilfully false; the true facts were that there existed certain complete fingerprints not those of this plaintiff and those facts were suppressed at the trial of this plaintiff, and were suppressed at the evidentiary hearing held before Justice White, until upon cross examination the said defendant SEARS admitted the true status of the fingerprints; plaintiff had had investigators search out the true facts during his stay on DEATH ROW, and the same were finally made known although wilfully suppressed by the representatives of Los Angeles County and the People of California, and the same constitutes the knowing use of perjured testimony, and a deprivation of the rights of this plaintiff, and plaintiff herewith incorporates the findings of 298 F. Supp. 795; in this allegation, the defendant SANFORD McCALEB and DE WITT LIGHTNER had personal knowledge of the true status of the fingerprint evidence, having made periodic checks of additional possible suspects suing the prints cleaned from the razor case, as set forth in 298 F. Supp. 795; at all times during the period in question, the defendant McCALEB and LIGHTNER and

SEARS conspired and acted to deprive this plaintiff of a fair and just trial, and led to his illegal and unlawful conviction of murder and sentence to death, and a resulting 10 year confinement in California Penal Institutions for crimes he did not commit; the said action of the foregoing defendants is chargeable under federal law to the defendant RICHARD PACHTMAN, as set forth in 298 F. Supp. 795, affirmed by the 9th Circuit, cert. denied, USS Ct.

The defendant DONAL H. SEARS personally conducted each and every portion of fingerprint identification, lifts, latents, and rolled printing of this plaintiff PAUL KERN IMBLER, or ordered or supervised the same. The defendant DONAL H. SEARS obtained and lifted a complete print off the Gillette Safety Razor case found within the coat of the killer left near the scene of the crime, and the same print so lifted was not fragmentary as testified to by the said DONAL H. SEARS, but was so complete that the said print had enough information to provide at least 10 to 12 points of comparison to compare to the available rolled fingerprints of PAUL KERN IMBLER and which allowed the said DONAL H. SEARS to definitely rule and know in his own mind that the latent print available was definitely NOT that of PAUL KERN IMBLER. The said complete print was found by the said DONAL H. SEARS at sometime PRIOR to the trial of the plaintiff PAUL KERN IMBLER, and it was known by the defendant DONAL H. SEARS that the complete latent print was not that of PAUL KERN IMBLER *before* the said DONAL H. SEARS took the witness stand and testified at the original trial of this plaintiff for murder in 1961 in the Court of the Honorable Mark Brandler. Further, not only did the said DONAL H. SEARS know and have possession of the said print in his investigation before the original trial in 1961, but the said DONAL H. SEARS caused a photograph to be made of the said latent print, and the said latent print was used to compare with known rolled exemplars of this plaintiff and others who were suspected of the murder, and indeed, enlarged photographs were made of the said latent print, and were

available before plaintiffs trial, and the same were preserved and finally made known at the evidentiary hearing before the late Thomas White, Justice of the Supreme Court of California, in 1962-1963 and related proceedings. The said defendant DONAL H. SEARS had full knowledge of the complete print with at least 10 to 12 possible points of comparison at the time before the said DONAL H. SEARS testified at the trial of this plaintiff, and continued to have possession of said print and the truth thereof, and finally before the said Justice Thomas White admitted that the complete print was not that of PAUL KERN IMBLER, although the said DONAL H. SEARS refused and reluctantly refrained from so admitting until he was pressed to do so at cross-examination at the evidentiary hearing before Justice Thomas White. The said complete print was in existence before the trial of petitioner, was preserved via enlarged photographs, was suppressed at trial and was finally admitted to be in existence by the defendant DONAL H. SEARS in his testimony before the late Justice Thomas White of the Supreme Court of California at the evidentiary hearing held in 1962-1963 and related proceedings. The full and complete latent print was found by the defendant DONAL H. SEARS and was known to the said DONAL H. SEARS during January, February, March and continuously up to and including the trial of this plaintiff in June of 1961, and the said complete prints and portions thereof were used by DONAL H. SEARS and the defendants SANFORD McCALEB and DE WITT LIGHTNER to compare with others who were suspected of the murder of Morris Hasson.

The knowingly and wilfully suppression of the foregoing fingerprints by the defendant DONAL H. SEARS, the photographs of same, and the use of the same for comparison purposes, which ruled out PAUL KERN IMBLER as the owner of said print, were a wilfull suppression of evidence material to the defendant DONAL H. SEARS, the defendant STANFORD McCALEB, the defendant RICHARD PACHTMAN, and the defendant DE WITT LIGHTNER, and constituted a criminal conspiracy to deprive this plaintiff of his civil rights within

the meaning of Title 42, Sections 1981-1988 of the United States Code.

Plaintiff incorporates by reference Amendment To Paragraph II Page 10-11 of Complaint; Response To Request For More Definite and Certain Allegations herewith as Exhibit "B" to this Complaint.

III

At all times herein mentioned, the defendant KENNETH W. SCARCE was a duly acting representative of the County of Los Angeles and the Police Department of the City of Los Angeles, and held himself out to be a duly qualified polygraph operator; the police department of Los Angeles in concert with the Office of the Los Angeles District Attorney subjected this plaintiff to a lie detector test which showed that this defendant was innocent of the crimes herein mentioned; while said information was and is inadmissible in a criminal trial, the said defendant RICHARD PACHTMAN, KENNETH SCARCE, SANFORD McCALEB and DE WITT LIGHTNER, individually and in concert, nonetheless proceeded to bring this defendant to trial knowing good and well that this defendant was innocent of the foregoing crimes by virtue of lie detector tests; that at the foregoing evidentiary hearing before Justice White, the representatives of the people admitted that they definitely knew that this plaintiff had not wielded the murder weapon, although all contentions of witnesses of the prosecution was that indeed this plaintiff had so wielded the murder weapon; the defendant KENNETH SCARCE knowing full well that plaintiff was innocent, did nothing to rectify said miscarriage of justice until the said SCARCE was produced as a witness to testify before Justice Thomas White of the Supreme Court of California at an evidentiary hearing ordered in 1962-1963, whereupon the said SCARCE admitted that this plaintiff was not the killer, and that the lie detector studies so proved that this plaintiff was not the killer.

IV

At all times herein mentioned, the defendant ECTOR A. GARCIA was a duly employed officer of the Los Angeles Police and an expert in sketching of suspects from verbal descriptions furnished by eye-witnesses, and did sketch a portrait of the killer of Morris Hasson, deceased herein; subsequently to the initial sketches which depicted someone other than this plaintiff, this plaintiff was designated as a defendant, wherein the said ECTOR GARCIA altered the sketch that was heretofore made to correspond more closely to this plaintiff; said acts were done individually and in collaboration with defendants McCALEB, LIGHTNER and PACHTMAN, and served to deprive this defendant of a fair and just trial; said sketch was used to aid in convicting this defendant; the above constitutes a conspiracy to deprive this plaintiff of his rights to a fair and just trial and resulted in a 10 year incarceration that is illegal and unlawful and deprived this plaintiff of his just rights as an American citizen.

V

At all times herein, the defendants SEARS, LIGHTNER, McCALEB and GARCIA were the agents of the Chief of Police of the City of Los Angeles, the late WILLIAM PARKER, and currently under the control of Chief of Police EDWARD DAVIS. The chief of Police of the City of Los Angeles is responsible for the acts of his agent officers, and the said chief of police acted to deprive this plaintiff of a fair and just trial and resulted in his illegal conviction and confinement for 10 years in state prisons.

VI

The defendant SANFORD RICHARD McCALEB and DE WITT CLINTON LIGHTNER were at all times duly acting officers of the City of Los Angeles Police Department, and performed pre-trial, during trial, and past trial investigatory activity, and gave their results to defendant RICHARD PACHTMAN, and/or negligently or wilfully failed to disclose certain other matters of defendant RICHARD PACHTMAN; defendants LIGHT-

NER and McCALEB performed extensive pre-trial interviews of witnesses, conspired to hold and perform illegal "line-ups" or "show-ups" involving this defendant in an effort to influence the testimony at trial of alledged witnesses Alfred Senon Costello, aka, Alfred J. Costello, Billy Hillen, Alonzo Dunlap, and James Fritz, within the meaning of the decision of the Supreme Court of the United States in *Stovall* vs. *Denno*, in that they forced plaintiff to don the overcoat worn by the killer, nodded and gesticulated in an identifying manner toward plaintiff when Costello, Hillen, Dunlap, and Fritz failed to identify plaintiff, placed all witnesses together at the time of the show-up, illegally sequestered plaintiff in a small 4 man line-up wearing the coat of the killer, and otherwise performed illegally held and constituted "suggestive" line-ups and show-ups in order to cause and make able the witnesses Costello, Hillen, Dunlap, and Fritz to identify this plaintiff at trial. All of the foregoing were deprivations of Due Process of Law within the 14th Amendment to the Constitution of the United States and are actionable within the meaning of 42 United States Code, Section 1983 and within the meaning of the decision of the United States Supreme Court in *Monroe* vs. *Pape*, 365 U.S. 167 as further overt acts, the defendants DE WITT LIGHTNER and SANFORD RICHARD McCALEB performed the following and further either failed wilfully or negligently failed to correct same when testified to by other prosecution witnesses Costello, Hillen, and Dunlap:

1. On or about January 5, 1961, defendants McCALEB and LIGHTNER participated in lifting finger prints from the razor case and interviewed witness Costello.
2. On or about January 7, 1961, defendants McCALEB and LIGHTNER interviewed witnesses Dunlap and Fritz.
3. On or about January 8, 1961, defendants McCALEB and LIGHTNER interviewed witness Hillen, who at said time was shown mugbooks.
4. On or about January 9, 1961 defendants McCALEB and LIGHTNER supplied photos to and conferred with defendant ECTOR GARCIO regarding drawing a composite of the killer.

5. On or about January 10, 1961, and January 11, 1961 defendants McCALEB, LIGHTNER and GARCIA perpetrated an initial composite of the killer with the aid of witness Hillen,

6. On or about January 12, 1961, defendants LIGHTNER and McCALEB met with witness Costello to alter said composite drawing done by defendant Garcia.

8. On or about January 13, 1961, defendants LIGHTNER and McCALEB met again with witnesses Costello and Hillen to further alter defendant GARCIA'S drawing.

8. On or about January 17, 1961, after plaintiff was confined in Pomona, defendants LIGHTNER and McCALEB met with unknown "witnesses" to again alter defendant GARCIA'S sketch of the killer.

9. On or about January 18, 1961, defendants GARCIA, McCALEB and SEARS again altered the sketch of defendant GARCIA.

10. On or about January 25, 1961, defendants McCALEB and LIGHTNER interviewed witness Hillen and showed witness Hillen photos of plaintiff.

11. On or about January 25, 1961, defendant McCALEB and LIGHTNER caused latent finger prints to be taken of plaintiff.

12. On or about January 25, 1961, witnesses Costello and Dunlap were shown photos of plaintiff by defendants McCALEB and LIGHTNER.

13. On or about January 30, 1961, defendants McCALEB and LIGHTNER rigged an unconstitutional lineup for witnesses Costello, Hillen, Dunlap and Fritz, and because witness Hillen was not "positive" of the identification, said defendants rigged a small suggestive lineup wherein plaintiff was required to don clothes worn by the killer; during said lineups, defendants McCALEB and LIGHTNER made suggestive mannerisms and nods of the head when plaintiff appeared for viewing, and the same was made in order to enable witnesses Dunlap, Costello, Fritz and Hillen to identify plaintiff after each had been shown preline-up photographs of plaintiff prior to January 30, 1961.

14. On or about February 1, 1961, defendants SCARCE, McCALEB and LIGHTNER planned the lie detector test for plaintiff.

15. On or about June 5, 1961, defendants McCALEB, LIGHTNER and PACHTMAN conferred with intent to plan trial of plaintiff.

16. On or about June 16, 1961, defendants McCALEB and LIGHTNER conferred with the Highland Park and Hollywood detectives regarding the check forgery activities of witness Alfred John Costello.

17. On or about June 19, 1961, defendants PACHTMAN, McCALEB and LIGHTNER conferred wherein they discussed witnesses, showing of photos to witnesses, and illegally held line-ups; at said time, all results of investigations were explained to defendant PACHTMAN by defendants McCALEB and LIGHTNER, or defendants McCALEB and LIGHTNER either wilfully or negligently concealed from defendant PACHTMAN the results of their investigations.

18. On or about June 21, 1961, defendants McCALEB and LIGHTNER conferred with defendant SEARS regarding latent finger prints on the Gillette Safety Razor case.

19. On or about June 22, 1961 defendants McCALEB and LIGHTNER with defendant SEARS made fingerprint comparisons of latent prints with those of Leroy Leonard Lingo, Mayes and Mahon.

20. On or about July 5, 1961 defendants McCALEB and LIGHTNER and PACHTMAN met and conspired to plot against plaintiff at his trial.

21. On or about July 6th thru July 13th, 1961, defendants McCALEB, LIGHTNER, and PACHTMAN conducted plaintiff's trial.

As to the foregoing 21 overt acts, defendants PACHTMAN, McCALEB and LIGHTNER knew of each and everyone of their occurrences; at trial, testimony was fraudulently and intentionally adduced by defendant PACHTMAN which defendants McCALEB and LIGHTNER willfully failed to correct; defendants McCALEB and LIGHTNER arranged for the arrest of Costello at the Courtroom of Judge Brandler and in accord with the

orders of defendant PACHTMAN, within the meaning of *Robichaud* vs. *Ronan*, 351 F. 2d. 533, ceased to have the said Costello arrested for forgery until the said Costello concluded testifying against plaintiff; all of said defendants knew of said Costello's illegal activities and concealed same from the jury, positively inducing the said Costello to lie about his current background and overtly failing to correct said testimony when it was present to the jury.

The foregoing deprivations of Due Process of law have been found to be true by the United States District Court for the Central District of California at 298 F. Supp. 795 FF, which plaintiff herewith incorporates by reference.

VII

Taken as a whole and individually, the foregoing defendants and each of them acted in violation of rights guaranteed by the Civil Rights Act of this nation, the United States Constitution, and the laws of this Country as determined by the foregoing Federal Courts, and as more particularly found in 298 F. Supp. 795, *Imbler* vs. *Oliver*, incorporated within this complaint by reference.

WHEREFORE, plaintiff prays judgment against the defendants and each of them, because of his mental cruelty suffered, his loss of consortium for 10 years, his confinement for 10 years, his constant fear of execution by lethal gas at the hands of the representatives of this state, his loss of employment opportunities and his general well being and right to live as a United States citizen as a free man as follows:

1. Against each defendant and his principal in the sum of $1,200,000.00 (ONE MILLION, TWO HUNDRED THOUSAND DOLLARS) exemplary damages suffered;

2. Against each defendant and his principal in the sum of $1,500,000.00 (ONE MILLION, FIVE HUNDRED THOUSAND DOLLARS) actual damages suffered);

3. Attorneys fees in the sum of $15,000.00 (FIFTEEN THOUSAND DOLLARS).

DATED: April 17, 1972.

/s/ Roger S. Hanson,
Attorney for Plaintiff
Paul Kern Imbler

EXHIBIT "A"

Plaintiff incorporates as if the same were fully set forth herein, all orders and documents before the United States Court of Appeals, 5th Circuit, in the matter of *Jim Garrison, District Attorney of Orleans Parish, New Orleans, Louisiana* vs. *Chief Judge John R. Brown,* as this Exhibit.

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Misc. No. 2281

JIM GARRISON, ET AL, PETITIONERS

versus

CLAY L. SHAW, RESPONDENT

On Application for Leave to Appeal from an Interlocutory Order

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Before BROWN, Chief Judge, INGRAHAM and RONEY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that leave to appeal from the interlocutory order of the United States District Court for the Eastern District of Louisiana entered on December 1, 1971, in the above styled and numbered cause, is hereby denied.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Civil Action No. 70-466

Section "B"

CLAY L. SHAW

versus

JIM GARRISON, et al.

ORDER OF CERTIFICATION
UNDER INTERLOCUTORY APPEALS ACT

This matter came on for hearing on November 10, 1971, on motions of defendants JIM GARRISON, WILLARD E. ROBERTSON, JOSEPH M. RAULT, JR., CECIL M. SHILSTONE and PERRY RAYMOND RUSSO, to amend this Court's order entered on November 1, 1971, denying defendants' motions to dismiss the complaint for failure to state a claim upon which relief can be granted, to include in its order an appropriate certification pursuant to 28 USC 1292(b). The Court, having heard the arguments of counsel and having studied the memorandum submitted by plaintiff, is now fully advised in the premises and ready to rule. Accordingly,

IT IS ORDERED that this Court's order, entered herein on November 1, 1971, denying defendants' motions to dismiss the complaint in the above-entitled and numbered action for failure to state a claim upon which relief can be granted, be, and it is hereby, amended to read as follows:

"IT IS THE ORDER OF THE COURT that the motions of defendants, Joseph M. Rault, Jr., Willard E. Robertson, Jim Garrison, Cecil M. Shilstone and Perry R. Russo, to dismiss, be, and the same are hereby, DENIED; but this Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation."

NEW ORLEANS, Louisiana, November 30, 1971.

/s/ Frederick J. H. Heebe
United States Judge

Roger S. Hanson
6265 Lubao Avenue
Woodland Hills, California
218-883-5365
Attorney for Paul Imbler

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 71-123-RJK

PAUL KERN IMBELER, PLAINTIFF

v.

RICHARD PACHTMANN, ET AL., DEFENDANTS

AMENDMENT TO PARAGRAPH II PAGE 10-11 OF COMPLAINT; RESPONSE TO REQUEST FOR SOME DEFINITE AND CERTAIN ALLEGATIONS

COMES now the Plaintiff Paul Kern Imber, and adds, amends, and makes more certain Paragraph II of the Complaint now on file and alleges as follows:

II

Plaintiff incorporates each and every allegation heretofore set forth in said paragraph II, pages 10 and 11 of the original complaint, and in addition asserts as follows:

The defendant Donal H. Sears personally conducted each and every portion of fingerprint identification, lifts, latents, and rolled printing of this plaintiff Paul Kern Imbler, or ordered or supervised the same. The defendant Donal H. Sears obtained and lifted a complete print off the Gillette Safety Razor case found within the Coat of the killer left near the scene of the crime, and the same print so lifted was not fragmentary as testified to by the said Donal H. Sears, but was so complete that the said print had enough information to provide at least 10 to

12 points of comparison to compare to the available rolled fingerprints of Paul Kern Imbler and which allowed the said Donal H. Sears to definitely rule and know in his own mind that the latent print available was definitely NOT that of Paul Kern Imbler. The said complete print was found by the said Donal H. Sears at sometime PRIOR to the trial of the plaintiff Paul Kern Imbler, and it was known by the defendant Donal H. Sears that the complete latent print was not that of Paul Kern Imbler BEFORE the said Donal H. Sears took the witness stand and testified at the original trial of this plaintiff for murder in 1961 in the Court of the Honorable Mark Brandler. Further, not only did the said Donal H. Sears know and have possession of the said print in his investigation before the original trial in 1961, but the said Donal H. Sears caused a photograph to be made of the latent print, and the said latent print was used to compare with known rolled exemplars of this plaintiff and others who were suspected of the murder, and indeed, enlarged photographs were made of the said latent print, and were available before plaintiffs trial, and the same were preserved and finally made known at the evidentiary hearing before the late Thomas White, Justice of the Supreme Court of California, in 1962-1963 and related proceedings. The said defendant Donal H. Sears had full knowledge of the complete print with at least 10 to 12 possible points of comparison at the time before the said Donal H. Sears testified at the trial of this plaintiff, and continued to have possession of said print and the truth thereof, and finally before the said Justice Thomas White admitted that the complete print was not that of Paul Kern Imbler, although the said Donal H. Sears refused and reluctantly refrained from so admitting until he was pressed to do so at cross-examination at the evidentiary hearing before Justice Thomas White. The said complete print was in existence before the trial of petitioner, was preserved via enlarged photographs, was suppressed at trial, and was finally admitted to be in existence by the defendant Donal H. Sears in his testimony before the late Justice Thomas White of the Supreme Court of California at the evidentiary hearing

held in 1962-1963 and related proceedings. The full and complete latent print was found by the defendant Donal H. Sears and was known to the said Donal H. Sears during January, February, March and continuously up to and including the trial of this plaintiff in June of 1961, and the said complete prints and portions thereof were used by Donal H. Sears and the defendants Sanford McCaleb and De Witt Lightner to compare with others who were suspected of the murder of Morris Hasson.

The knowingly and wilfully suppression of the foregoing fingerprints by the defendant Donal H. Sears, the photographing of same, and the use of the same for comparison purposes, which ruled out Paul Imbler as the owner of said print, were a wilfull suppression of evidence material to the defendant, and constituted a knowing use of perjured testimony by the defendant Donal Sears, the defendant Stanford McCaleb, the defendant Richard Pachtmann, and the defendant De Witt Lightner, and constituted a criminal conspiracy and a conspiracy to deprive this plaintiff of his civil rights within the meaning of Title 42, Sections 1981-1988 of the United States Code.

Dated: March 8, 1972.

/s/ Roger S. Hanson
Attorney for the Plantiff

EXHIBIT "C" is omitted from the record here as it appears on pages 30-60 Supra.

JOHN D. MAHARG, County Counsel and
RICHARD G. BRUNGARD, Deputy County Counsel
648 Hall of Administration
Los Angeles, California 90012
MAdison 5-3611 Station 64452

Attorneys for Richard Pachtmann, as an individual

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civ. No. 71-123-IH

PAUL KERN IMBLER, PLAINTIFF

-vs-

RICHARD PACHTMANN, as an individual, RICHARD PACHTMANN, as an agent of the County of Los Angeles, Office of the District Attorney, et al., DEFENDANTS

NOTICE OF MOTION, MOTION TO DISMISS AND POINTS AND AUTHORITIES

TO: ROGER S. HANSON, Esq.
P. O. Box 4278
Honolulu, Hawaii
and
ROGER S. HANSON, Esq.
Kapiolani Townhouse
1624 Kanunu, Apt. 1203
Honolulu, Hawaii 96814

PLEASE TAKE NOTICE that on Monday, November 29, 1971, at 2 P.M., or as soon thereafter as counsel can be heard, RICHARD PACHTMANN, defendant, will move this court, at Coutroom No. 11, United States Court House, 312 North Spring Street, Los Angeles, California, as follows:

To dismiss the action because the complaint fails to state a claim against the defendant, RICHARD PACHTMANN, upon which relief can be granted.

DATE: November 2, 1971

JOHN D. MAHARG,
County Counsel

By /s/ Richard G. Brungard
RICHARD G. BRUNGARD
Deputy County Counsel
Attorneys for Richard Pachtmann, as an individual

POINTS AND AUTHORITIES

I

INTRODUCTION AND FACTUAL SITUATION

Shortly after 8:30 P.M. on the night of January 5, 1961, a small grocery store in the City of Los Angeles operated by Mr. and Mrs. Morris Hasson was the subject of an attempted robbery by two men. In the course of this robbery attempt, the proprietor, Mr. Hasson, was shot and killed by one of the two men. The plaintiff, Mr. Imbler, was identified by three eye witnesses: Alfred John Costello, Billy Lou Hillen, and Alonzo Dunlap. These witnesses testified that Imbler was the person who did the shooting.

The jury found Imbler guilty of first degree murder. The case went up on automatic appeal to the Supreme Court, and the conviction was affirmed. *People* vs. *Imbler*, 57 Cal. 2d 711 (May 1962). This case is attached as Exhibit "A."

Thereafter Imbler sought a writ of habeas corpus in the California Supreme Court. The writ was denied on the basis of the Referee's findings following an evi-

dentiary hearing. *In re Imbler*, 60 Cal. 2d 554. A copy of this decision is attached as Exhibit "B."

Imbler than filed a second petition for a writ of habeas corpus in the state courts challenging solely the penalty of death. The California Supreme Court reversed the judgment imposing the death penalty. *In re Imbler*, 61 Cal. 2d 556.

Imbler then initiated habeas corpus proceedings in the Federal Courts. No factual hearings were heard by the United States District Court Judge. This Judge chose to rely upon the Reporter Transcripts of Imbler's trial and of the state habeas corpus hearing, as well as the Referee's Report thereon. Judge Ferguson rendered an opinion in April of 1969 cited as *Imbler* vs. *Craven*, 298 Fed. Supp. 797, a copy of which is attached as Exhibit "C."

After a full hearing the Supreme Court of California and the Referee appointed by them determined that the evidence did not show that prosecution knowingly used false evidence to gain the conviction of Imbler. Judge Ferguson, however, reached the opposite conclusion as set forth in his opinion.

Imbler has brought the present action pursuant to United States Code Sections 1981 through 1988 alleging denial of his civil rights and damages resulting therefrom claiming: (1) That the prosecuting Deputy District Attorney, RICHARD PACHTMANN, defendant herein, knowingly used perjured testimony against Imbler; (2) That the prosecuting Deputy District Attorney, RICHARD PACHTMANN, conspired with city police officers to deprive Imbler of his civil rights and a fair and just trial, overt acts in furtherance of said conspiracy being (a) permitting witness Costello to give perjured testimony regarding his commitment to a mental hospital; (b) permitting witness Costello to falsely testify regarding his education; (c) permitting witness Costello to testify that he was now "going straight" and "was having no further trouble with the law"; and (d) It is alleged that both the prosecuting Deputy District Attorney, RICHARD PACHTMANN, and a police officer were present in the court room when Costello made a false

statement concerning the viewing of pre-trial photographs; he further failed to correct the false testimony given by the witness Billy Hillen; (The foregoing is an attempt to briefly summarize the allegations against the prosecuting Deputy District Attorney, RICHARD PACHTMANN, and the court is referred to the fourteen-page complaint for the details of all of the allegations.)

II

PROSECUTING ATTORNEYS ARE IMMUNE FROM SUIT UNDER THE CIVIL RIGHTS ACT.

In the case of *Agnew* vs. *Moody*, 330 Fed. 2d 868 (1964) the appellant was convicted and sentenced for violation of a traffic law. He brought suit in the Federal Courts against the city prosecuting attorney, among others, for violation of 42 U.S.C. 1983, 1985, and 1986. A motion for dismissal was granted by the district court and affirmed on appeal because the plaintiff failed to state a claim for relief. The court held: (1) "We have repeatedly held that judges and 'quasi judicial' officers, including prosecuting attorneys, are immune from suit under the Civil Rights Act for conduct in the performance of their official duties." (Page 869) (2) "Appellant argued that the doctrine of judicial immunity is never a valid defense as to a charge of conspiracy, since taking part in a conspiracy is outside of the judicial function. But conspiracy was alleged in *Harmon* vs. *Superior Court*, 329 Fed. 2d 154 (9th Circuit 1964). And although conspiracy is an essential element of the offense under 42 U.S.C.A. Section 1985, the doctrine of immunity nonetheless applies to actions under that section." (Page 869)

The United States Court of Appeals affirmed the District Court dismissal of a complaint which did not state a claim upon which relief could be granted in the case of *Ney* vs. *State of California*, 439 Fed. 2d 1285 (1971). Neys complaint alleged that the police chief altered electronic tapes of an interrogation to make it appear that Ney had incriminated himself, and further

alleged that the district attorney knowingly used said altered tapes at Neys's preliminary hearing and at his trial. The court states as follows on page 1287: "As to district attorney Sorenson, the judgment (of dismissal) is also correct. Assuming, without deciding, that he would be liable for the acts of his deputy, what he or his deputy is alleged to have done was done in the course of his prosecuting function. Carrying out that function, he is immune." (Parenthetical expression added)

In the case of *Sires* vs. *Cole*, 320 Fed. 2d 877 (1963) the Federal District Court dismissed plaintiff's complaint, which was based upon the Civil Rights Act. Upon appeal the dismissal was affirmed. The complaint alleged that the plaintiff, in a criminal proceeding, had pled guilty to the theft of a calf, which offense was only a misdemeanor. The complaint alleged that the defendant prosecuting attorney, along with other defendants, wilfully abused his duties and tricked Sires with the intent to falsely imprison him. In a collateral proceeding it was determined that he was sentenced for a felony and should have only been sentenced for a misdemeanor. In sustaining the dismissal of the complaint the court stated: "Judges are immune from suit arising out of their judicial acts, without regard to the motives with which their judicial acts are performed, and not withstanding such acts may have been performed in excess of judisdiction, provided there was not a clear absence of all jurisdiction over subject matter." (Page 879) "A prosecution attorney is a quasi-judicial officer and enjoys the same immunity from a civil action for damages as that which protects a judge." (Page 880)

In the case of *Diaz* vs. *Chatterton*, 229 Fed. Supp. 19 (1964) the plaintiff alleged in his complaint six overt acts on the part of defendant deputy district attorney and other defendants for conspiracy in violation of 42 U.S.C. 1985. One overt act was alleged to be the securing of a bribe of a witness to falsely testify against the plaintiff. Another overt act alleges that the deputy district attorney and other defendants suppressed evidence and falsely maintained the lawsuit out of passion and prejudice with the intent to deprive plaintiff of equal protection of the

laws and to deprive him of his freedom. On page 22 of the opinion, the court states: "The court now considers the motion to dismiss the within action, having in mind the facts and circumstances as they now appear to exist. Defendant Chatterton, being a deputy district attorney for Orange County, California, is immune from the within suit. (Citing cases)"

III

GOVERNMENT CODE OF THE STATE OF CALIFORNIA, SECTION 821.6, GRANTS IMMUNITY TO THE DEFENDANT, RICHARD PACHTMANN.

Government Code Section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

By reason of the overwhelming weight of authority it is respectfully requested that the complaint against defendant, RICHARD PACHTMANN, be dismissed.

Respectfully submitted,

JOHN D. MAHARG,
County Counsel

By /s/ Richard G. Brungard
Deputy County Counsel
Attorneys for Defendant
Richard Pachtmann, as
an individual

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UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 71-123-RJK

PAUL KERN IMBLER, PLAINTIFF

v.

RICHARD PACHTMAN, *et al.*, DEFENDANTS

POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS CASE AGAINST RICHARD PACHTMAN, DISTRICT ATTORNEY

I

PROSECUTORS IN THE NINTH CIRCUIT ARE NOT IMMUNE IN 42 USC 1983-1985 SUITS IF THEIR ACTS ARE OUTSIDE THE NORMAL FUNCTIONS PERFORMED IN THE JUDICIAL PROCESS

This Court's attention is directed to the major decision of the United States Court of Appeals for the Ninth Circuit in *Robichoud* v. *Ronan*, 351 F. 2d 533 (October 8, 1965, CCA, 9th Cir.) a case which is subsequent to the decisions cited by the moving party in *Agnew* v. *Moddy*, 330 F. 2d 868 (1964) and *Harmon* v. *Superior Court*, 329 F. 2d 154 (1964). Anytime a district attorney engages in activity which is ordinarily related to the POLICE function causes him to lose any purported immunity that he may have when he is legitimately acting in a quasi-judicial role. In the Robichoud case, the District Attorney engaged with the police and sheriffs to deprive the plaintiff Theresa Hobichoud of her civil rights, and our ninth Circuit was quick to note that mere-

ly because the defendant was a District Attorney, he was thereby not enshrouded with some magic cloak to aid him in perpetrating any violation that would send some one who was not a District Attorney to prison for his acts.

The Court noted at page 535 of the opinion some of the traditional reasons cited for the so-called immunity, inter alia,

(1) danger of influencing public officials with threat of suit;
(2) deterent effect of potential liability on men who are considering entering public life;
(3) drain on valuable time of the official caused by "insubstantial" suits
(4) unfairness of subjecting officials to liability for the acts of their subordinates
(5) theory that the official owes a duty to the public and not to the individual
(6) the feeling that the ballot and formal removal proceeding are more "appropriate ways to enforce the honesty and efficiency" of public officers

It is submitted that if these above reasons are in any way authoritative, they border on the ludicrous. To shield a bandit District Attorney such as the one now before the Court with any degree of immunity for his unprofessional conduct that caused the plaintiff twice to be within the door of the gas chamber is reasoning that "shocks the conscience". *Rochin* v. *California*, 342 U.S. 165.

The better reasoned rule is and should be that the District Attorney may enjoy his immunity when he is HONESTLY performing this task in running his lawsuit—surely this District Court nor any thinking Court can not condone the deliberate use of perjured testimony in a capital punishment case as being "within the judicial process" so that a judge who permits it and a District Attorney who uses it and permits police officers to deliberately perjure themselves is still thereby acting within the judicial process. *God help us if that is the case.*

The Ninth Circuit has held in Robichaud that:

> "Thus, if immunities are broadly granted to state officials without consideration of the nature of their alleged misdeeds and the reason for their immunity, the statute becomes subject to circumvention, if not emasculation." ante, at page 536.

The Court goes on thereafter to hold:

> The key to the immunity previously held to be protective to the prosecuting attorney is that the acts, alleged to have been wrongful, were committed by the officer IN THE PERFORMANCE OF AN INTEGRAL PART OF THE JUDICIAL PROCESS.
>
> Question: Is the deliberate use of perjured testimony and the failure to correct perjured testimony when it is introduced in a criminal trial, and the directing of police officers to act and refrain from acting AN INTEGRAL PART OF THE JUDICIAL PROCESS??????

If this Court believes that it is, then dismiss Richard Pachtman from further liability. Concomitantly, we give the man Carte Blanche judicial approval to repeat his miserable deeds with some other poor defendant who might this time get executed and not live to seek redress under the Civil Rights act.

The District Attorney in this case performed police function activities. He directed the Los Angeles Police Officers to refrain from arresting the prize perjurer Alfred John Costello until the said Richard Pachtman had finished using the said Alfred John Costello as a witness against Imbler, and then immediately asked the said Costello whether the said Costello was "now going straight", and "Whether he was in any further trouble with the law", to which the said Costello replied that he was not, and the District Attorney failed to correct this lie. In this case, and in this instance, Pachtman was engaging in police activity by DIRECTING THE POLICE TO DO AND REFRAIN FROM DOING THEIR NORMAL FUNCTIONS, and as such he is as liable as the police for these misdeeds. In Robichaud, supra,

the District Attorney directed the police/sheriffs to take Miss Robichaud out of her jail cell to the scene of the crime, etc. as may be seen by reading said opinion. In this way, the District Attorney usurped the police role, and if these acts are wrong, he is as liable as the police in the Ninth Circuit. In the instant case, the District Attorney interacted with the fingerprint experts to suppress important fingerprints. This is his investigative role, a police function, and one from which he is not immunized and one from which he should not be immunized. In the case at bar, the District Attorney conducted personal investigative work with Costello, who told him that he, Costello, had been voluntarily placed in the mental hospital. Following that, the District Attorney Pachtman further investigated the truth and learned that the truth was that Costello had been placed in the mental hospital because of the fact he had been charged with many California felonies, and in fact had been found not guilty of some of these by virtue of his being deemed legally insane. In this role, the District Attorney was operating in the police function of investigation, and Robichaud does not cloak him with any phony immunity. Further, defendant Pachtman conducted immense investigations into the case of Paul Kern Imbler following the trial via and with the various defendant police officers, penning a letter to Governor Edmund G. Brown, advising the Governor of the results of some of the investigation, and yet did nothing about the conviction, knowing all the while that the investigative work that he, Pachtman, had engaged in clearly showed the perjury that had occurred in the trial. Further Pachtman conducted investigative work with the aid of his police officer defendant investigators, De Witt Lightner and Saford McCaleb, which revealed that Costello was within the walls of either San Quentin or State Insane Hospitals, and the defendant suffered the said Costello to give a lengthy discourse initiated by Pachtmann on how the said Costello had rehabilitated himself by two college degrees and who was now working as an engineer making $10,000 per annum. At this time, the investigative work of the defendant with his police officers

showed that the said Costello was hanging bad check paper all over town, and among his victims was the wife of the decedent, Buelah Hassen. In all of these roles, Richard Pachtman was quasi-police and was working hand-in-glove with the police element, and is not shrouded with any phony immunity.

This Court must never lose sight of the multitude of authority cited in Imbler v. Craven, 298 F. Supp. 795, holding that knowing use of perjured testimony is a denial of Due Process of Law, and automatically causes the conviction to be infirm. The knowing Denial of Due Process of Law surely is not a part of the judicial process, nor can it be part of the quasi-judicial process.

The Ninth Circuit stated at 536 in Robichaud:

> "We believe, however, that when a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity—integral relation between his acts and the judicial process—ceases to exist. IF HE ACTS IN THE ROLE OF A POLICEMAN THEN WHY SHOULD HE NOT BE LIABLE, AS IS THE POLICEMAN, IF, IN SO ACTING, HE HAS DEPRIVED THE PLAINTIFF OF RIGHTS, PRIVILEGES, OR IMMUNITIES SECURED BY THE FEDERAL CONSTITUTION AND LAWS. . . . It is not appropriate that immunity should protect the one and not the other. . . ."

The Ninth Circuit cites with adoptive approval the case Lewis v. Brautigam, 227 F. 2d 124 (5th Cir., 1955). There the District Attorney engaged in the investigative role, and was sued for his acts, and the cause of action upheld. Ante at page 537 in Robichaud.

> The Ninth Circuit indicated that the trial Court must ". . . Determine the nature of the acts alleged to have been wrongfully committed, for the appellees may have abandoned their "quasi-judicial role". If they, so doing, committed acts, or authoritatively directed the commission of acts, which ordinarily are related to police activity as opposed to judicial

activity, then the cloak of immunity should not protect them. . . *The title of office, quasi-judicial, or even judicial, does not, of itself, immunize the officer for unlawful acts which cannot be said to constitute an integral part of the judicial process.*" Ante, page 537-538.

It must be further noted that plaintiff alleges that the District Attorney conspired with police officers who prima facie were engaged in the police-investigative role, and in so doing the District Attorney becomes a part of their police investigative role, and under Robichaud, the erstwhile Richard Pachtman is LIABLE for these police-investigative acts done outside the judicial role, or the quasi-judicial role.

In finality, the immunity granted to District Attorneys by some of the cases surely fails to withstand the test of Reason or logic. These men, of all people, sworn to uphold the law as to ALL the people, not just the "good" people, must be never given the cloak of immunity to do as they please in the Court rooms, as this gentleman Richard Pachtman has done in this case. Through the efforts of Richard Pactman, Paul Kern Imbler was almost executed twice, he served some 10 years in prison for a crime he did not commit, he was forced to undergo the highest of indignities at the behest of the State, he lost his wife, his children, his consortium, yes, even his God-given right to make love. To state that the Courts may engraft immunity to a "professional man" like Richard Pachtman certainly shocks the conscience of any thinking man. I dare say that if every judge who voted to give his ilk "immunity" would have suffered the same acts undergone by Paul Kern Imbler, there would be few opinions granting any type of immunity to the felonious conduct of Richard Pachtman.

Counsel submits that there should be no immunity granted at all to a District Attorney who fails to practice honestly and represent the People of the State of California honestly; that in any event all of the acts of Pachtman were outside of the "judicial" role or process, and were police and investigative, and as such the said

Pachtman remains liable for these acts, all of which have been previously established by the United States District Court, the Honorable Warren J. Ferguson, 298 F. Supp. 795.

Counsel attaches herewith copies of the authority relied upon by the County Counsel. In particular, it is submitted that the case Agnew v. Moody, supra, involves an apparent disgruntled plaintiff who was arrested and given a TRAFFIC TICKET, and apparently filed some type of frivolous suit against the judge, the city attorney, and others for "conspiracy". Its details are so sparse that no authority can be gleaned from it to place beside the general rule of Robichaud that liability exists if the city attorney was outside the judicial function, or the quasi-judicial function. It merely reiterates the tired cliche that these "Public attorneys" should be given immunity, to which counsel thoroughly agrees, IF THEY ARE HONEST AND ARE BEHAVING THEMSELVES AND TRYING THEIR CASE HONESTLY. No thinking advocates adheres to the filing of frivolous suits against the municipality and its employees. Agnew, handed down in 1964, hardly supplies authority for any proposition, and surely is squareable with Robichaud, supra.

Diaz v. Chatteton apparently involves a District Attorney who only filed a criminal complaint against the plaintiff Diaz—little indicates that he in doing this was acting outside his judicial or quasi-judicial role. A vague allegation of "suppression" of some statement of a witness may bring one to question whether the same was involving the District attorney with the investigative role, or the police role, condemned in Robichaud, but the Court is silent on this point. Moreover, it is a District Court opinion prior to Robichaud, and therefore it cannot be ascertained whether the District Judge even knew of the authority limiting the District Attorney to his quasi-judicial status in order to maintain his immunity. It serves little to elucidate the problem one way or the other. Sires v. Cole, attached, involved the stealing of a calf, a misdemeanor, for which the defendant erroneously was sentenced as a felon. For all that appears on the face of the case, it was an honest mistake of both the Court

and the District Attorney, which was corrected via habeas corpus, and the case is so terse that one cannot ascertain anything but that all parties were merely engaged in a simple Courtroom mistake; police roles and investigators were apparently never involved in the case. It was a 1963 decision and failed to enunciate the Robichaud line of reasoning. It is of no effect to decide the instant problem. Harmon v. Superior Court, supra, is totally devoid of facts, and one cannot predicate authority on it, but it appears to be the action filed by a disgruntled husband who was forced to pay either alimony or child support. It is a 1964 case, predating Robichaud, and apparently does not contain the problems of either Robichaud or Imbler.

Ney v. California, 439 F. 2d 1285 (1971) is perhaps the most analogous case relied upon by the County Counsel. It is difficult to square the fact that if it is alleged that the police engaged in the altering of testimony, which would clearly hold them in a civil rights suit, Monroe v. Pape, 365 U.S. 167, and that thereafter the police turned the altered tape over to the District Attorney, and the District Attorney thereafter used it in the trial knowing it was Altered, that thereby the District Attorney had not conspired in the police-investigative role. The case is simply too sparse, however, to bottom much discussion upon. If it be said that the tape was merely given to the district attorney without the district attorney asking questions, or being told anything, he may logically expect immunity. If he knowingly engages in the use of an altered tape, it defies logic that the use of altered testimony is part of either the judicial process or the quasi-judicial process. Again, God help us all if it is.

II

CALIFORNIA STATE STATUTES CAN IN NO WAY ALTER FEDERAL CAUSES OF ACTION UNDER 42 U.S.C. 1983

States cannot create defenses to the Federal Civil rights Act. Delatte v. Genovese, 273 F. Supp. 654.

The Courts attention is directed this time to the recent decision of the Ninth Circuit Donovan v. Reinbold, 433 F. 2d 738, herewith attached, for the more modern approach that these public attorneys do not enjoy unreasoned carte blanche immunity.

WHEREFORE, it is respectfully and with reason asked that the defendant Richard Pachtman's motion to escape his liability be denied.

Respectfully submitted,

/s/ Roger S. Hanson
ROGER S. HANSON
Attorney for
Paul Kern Imbler.

Copy served by mail this 23rd day of November on Richard G. Brungard, County Counsel, 648 Hall of Administration, Los Angeles, California 90012. I declare the foregoing true under the penalty of perjury.

/s/ Roger S. Hanson
ROGER S. HANSON

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil No. 71-123-RJK

PAUL KERN IMBLER, PLAINTIFF

vs.

RICHARD PACHTMANN, *et al.*, DEFENDANTS

OPINION AND ORDER GRANTING DEFENDANT RICHARD PACHTMANN'S MOTION TO DISMISS AND DIRECTING ENTRY OF FINAL JUDGMENT

Defendant Richard Pachtmann brought this motion ". . . [t]o dismiss the action because the complaint fails to state a claim . . . upon which relief can be granted," pursuant to Federal Rules of Civil Procedure 12(b)(6). The issue raised by Pachtmann is whether he is immune from liability under the Civil Rights Act, 42 U.S.C. § 1983, *et seq.*, by virtue of the doctrine of prosecutional immunity.

After a jury trial in the Superior Court of the State of California, County of Los Angeles, plaintiff was convicted of first degree murder and assault with a deadly weapon with intent to commit murder; he was sentenced to death on the murder charge and to a term of imprisonment not to exceed ten years on the assault charge. The judgment was affirmed by the California Supreme Court, *People* v. *Imbler*, 57 Cal. 2d 711, 21 Cal. Rptr. 568, 371 P.2d 304 (1962), and, thereafter, plaintiff petitioned the California Supreme Court for a writ of habeas corpus which was denied, *In re Imbler*, 60 Cal. 2d 554, 35 Cal. Rptr. 293, 387 P.2d 6 (1963), *cert. denied*, 379 U.S. 908, 85 S.Ct. 196. Later, plaintiff filed a second petition for a writ of habeas corpus in the State Courts challenging the trial court's instructions that in determining the penalty the jury could consider the possibility of parole after seven years imprisonment. Holding that these instructions were improper, the California Supreme

Court reversed the judgment imposing the death penalty, *In re Imbler*, 61 Cal. 2d 556, 35 Cal. Rptr. 293, 387 P.2d 6 (1964), and, on remand, plaintiff was sentenced to life imprisonment on the murder charge.

Plaintiff unsuccessfully sought a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of California, but that Court's denial of the petition was reversed by the Court of Appeals and transferred pursuant to 28 U.S.C. § 2241 (d), *Imbler* v. *Craven*, 397 F.2d 277 (9th Cir. 1968), to this District where a Judge of this Court granted the petition, *Imbler* v. *Craven*, 298 F. Supp. 795 (C.D. Cal. 1969), affirmed, *Imbler* v. *California*, 424 F.2d 631 (9th Cir. 1970), *cert. denied*, *California* v. *Imbler*, 400 U.S. 865, 91 S.Ct. 100 (1970).

Thereafter, plaintiff brought this action against Pachtmann, the Deputy District Attorney who prosecuted the criminal case in the Superior Court, and certain others. The First Amended Complaint, which the Court permitted to be filed on April 18, 1972, alleges that Pachtmann, along with certain other named defendants, conspired to commit and committed a series of acts of "deliberate malfeasance, misfeasance, non-feasance, failure to inform and correct," all designed to deprive plaintiff of life, liberty and due process of law by unlawfully charging and obtaining his conviction for murder and assault with intent to commit murder. Pachtmann is alleged to have committed these acts in his capacity as a Los Angeles County Deputy District Attorney and in his individual capacity.

As part of this conspiracy to deprive plaintiff of a fair trial, Pachtmann is alleged, knowingly, to have produced false and perjured testimony prejudicial to plaintiff in that he called as a witness one Costello, a convicted felon who had been committed to an institution for the criminally insane. Costello, allegedly with Pachtmann's knowledge, testifed falsely as to his educational background, his mental competence, his purported "viewing of pretrial photographs," and to have given untrue and prejudicial identification testimony implicating plaintiff in the criminal acts charged in his Superior Court trial;

Pachtmann allegedly did nothing to correct this use of false and perjured testimony.

It is further alleged that Pachtmann ordered officers of the Los Angeles Police Department to refrain from arresting Costello on a charge of forgery until Pachtmann had concluded his use of Costello as a witness, all of which conduct plaintiff asserts constitutes a traditionally exclusive police activity within the purview of *Robichaud* v. *Ronan*, 351 F.2d 533 (9th Cir. 1965). The First Amended Complaint also alleges that Pachtmann suppressed true and elicited false fingerprint evidence and expert testimony, acted to alter a sketch of plaintiff used for identification purposes, and, with another, suppressed the results of polygraph tests which exculpated plaintiff.

The First Amended Complaint further attempts to incorporate by reference the decision of this Court in *Imbler* v. *Craven*, 298 F. Supp. 795 (C.D. Calif. 1969), plaintiff's successful habeas corpus proceeding under 28 U.S.C. § 2254, and alleges that the findings therein made by a Judge of this Court are binding in the present action. While the Court may, of course, take judicial notice in this proceeding of matters determined in other Court actions, a plaintiff proceeding under 18 U.S.C. § 1983 must allege highly specific facts, not mere conclusory allegations, *Weyandt* v. *Mason's Stores, Inc.*, 279 F. Supp. 283 (W.D. Pa. 1968), *Pugliano* v. *Staziak*, 231 F. Supp. 347 (S.W. Pa. 1964), affirmed 345 F.2d 797 (3d Cir. 1965), and prove these allegations by a preponderance of the evidence, *Walyd* v. *Kane*, 283 F. Supp. 450 (E.D. Wis. 1968). Even though a state court adjudication may not, under certain extraordinary circumstances not here present, be res judicata against a plaintiff in a subsequent federal civil rights action growing out of the same incident, *Whitner* v. *Davis*, 410 F.2d 24 (9th Cir. 1969), the Court knows of no authority which sanctions, much less requires, that findings in a proceeding under 28 U.S.C. § 2254 be applied as res judicata or collateral estoppel in favor of a plaintiff in a subsequent federal civil rights action growing out of the same incident. Particularly is this so where, as here, the parties

defendant are different and there has been no showing of any substantiality of interest between the defendant in the habeas corpus proceeding and the present defendants. Hence, in determining the present motion to dismiss, the Court limited its consideration to the specific factual allegations of the First Amended Complaint and considers that the findings of *Imbler* v, *Craven*, *supra*, as such, have no bearing on the disposition of the present motion.

The question presented by this motion is whether the acts of Pachtmann alleged in the complaint are embraced by the immunity extended to prosecutors acting within the scope and course of their official duties. In determining the sufficiency of the First Amended Complaint to state a claim upon which relief can be granted, the Court must, of course, accept the allegations of the First Amended Complaint as true and in the light most favorable to the plaintiff. *Robichaud* v. *Ronan*, *supra*, at 534.

Basis for Prosecutor's Immunity

42 U.S.C. § 1983, upon which jurisdiction of the present action is premised, provides:

> "§ 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress."

Jurisdiction for suits brought under § 1983 is vested in the District Courts by virtue of 42 U.S.C. § 1988.

No immunity from liability for the proscribed conduct is mentioned in the statute, but the doctrine of prosecutorial immunity has been engrafted in favor of certain public officials for acts done in the course and scope of their employment. Courts have repeatedly held that public prosecutors are immunized from civil liability for acts done as part of their traditional official functions. *Dodd* v. *Spokane County*, 393 F.2d 330 (9th Cir. 1968); *Agnew* v. *Moody*, 330 F.2d 868 (9th Cir. 1964),

cert. denied, 379 U.S. 867, 85 S.Ct. 137; *Diaz* v. *Chatterton*, 229 F. Supp. 19 (S.D. Cal. 1964); *Kostal* v. *Stoner*, 292 F.2d 492 (10th Cir. 1961), *cert. denied*, 369 U.S. 868, 82 S.Ct. 1032, rehrg. denied, 370 U.S. 920, 82 S.Ct. 1559; *Puett* v. *Detroit, Dept. of Police*, 323 F.2d 591 (6th Cir. 1963), *cert. denied*, 376 U.S. 957, 84 S.Ct. 978; *Jennings* v. *Nester*, 217 F.2d 153 (7th Cir. 1954), *cert. denied*, 349 U.S. 958, 75 S.Ct. 888.

Several reasons have been advanced in support of prosecutorial immunity: (1) to avoid influencing prosecutorial decisions by threat of civil liability, (2) to avoid deterring qualified persons from entering employment as prosecutors, (3) to avoid wastefully draining prosecutors' time and energy on matters collateral to their prosecutorial functions, and (4) to encourage and enforce honesty and efficiency among prosecutors through ballot and formal removal proceedings rather than civil litigation. See *Robichaud* v. *Ronan, supra*, at 536, 537.

Scope of Prosecutorial Immunity

The courts have repeatedly asserted that the immunity afforded prosecutors and other quasi-judicial personnel is equated, in scope, with that afforded Judges. *Friedman* v. *Younger*, 282 F. Supp. 710 (C.D. Cal. 1968); *Clark* v. *State of Washington*, 366 F.2d 678 (9th Cir. 1966); *Robichaud* v. *Ronan, supra.*

This immunity is not, however, without limit and under some circumstances prosecutors lose their immunity if their acts are beyond the scope of the prosecutorial function. *Robichaud* v. *Ronan, supra*; *Corsican Productions, Inc.* v. *Pitchess*, 338 F.2d 441 (9th Cir. 1964). Thus, neither the title under which a prosecutor acts nor the characterization of his activities will suffice to bring him within the scope of the privilege. See *Robichaud* v. *Ronan, supra.* Instead, the Court of Appeals of this Circuit has said:

> "[t]he trial court must determine the nature of the acts alleged to have been wrongfully committed. . . . If . . . the commission of acts . . . are related to police activity as opposed to judicial activity, then the cloak of immunity should not protect them." *Robichaud* v. *Ronan, supra* at 537.

In Robichaud, upon which plaintiff relies, defendants prosecuted plaintiff on a charge of first degree murder. The complaint was filed with malicious motive and without probable cause, and pursuant to the charge plaintiff was arrested and placed in custody for a non-bailable offense. During her imprisonment plaintiff was taken to another county, the scene of the alleged crime, and without being afforded counsel, was threatened and intimidated in an unsuccessful effort to obtain her confession. Though there was insufficient evidence to establish probable cause for the crime charged, defendants refused to dismiss the complaint, refused to produce evidence or to proceed with a preliminary hearing and, thereby, deprived plaintiff of her rights. *Robichaud* v. *Ronan, supra*, at 534, 535.

Whether *Robichaud* answers the question here presented is unclear. It appears to affirm the traditional doctrine that acts within the course and scope of the prosecutorial function remain privileged, but the holding does not distinguish between those allegations of the complaint in *Robichaud* which come under the privilege and those which do not. Indeed, many of the acts upon which the complaint therein appears predicated would seem to be acts well within the traditional scope of prosecutorial activity. Moreover, the Court stated that a prosecutorial immunity ceases to exist when the prosecutor is no longer functioning as such, but is, instead, engaging in conduct usually associated with police activity. *Robichaud* v. *Ronan, supra*, at 536. This distinction is easier to draw than to apply. For example, investigation and interrogation of witnesses, including the accused, may properly be part of the prosecutorial activity though this activity is also associated with police activity. It is not clear from *Robichaud* whether prosecutors are to be immune from civil liability only for part of their traditional functions and, if so, whether this does not in effect, completely undermine prosecutorial immunity. In the context of the *Robichaud* case it would appear that malfeasance by way of gathering and presenting perjured testimony would come within the ambit of the privilege while directing an arrest on the basis of such

testimony would not lay within the privilege. See *Robichaud* v. *Ronan*, *supra*, at 537.

Sufficiency of the Pleadings

Though the matter before the trial court in *Robichaud* was, as here, a motion to dismiss the complaint, the Court of Appeals stated:

> "[t]he trial court must determine the nature of the acts alleged to have been wrongfully committed, for the appellees may have abandoned their 'quasi-judicial' role. If they, so doing, committed acts, or authoritatively directed the commission of acts, which ordinarily are related to police activity as opposed to judicial activity, then the cloak of immunity should not protect them." *Robichaud* v. *Ronan*, *supra*, at 537.

But the test appears to be, not whether the prosecutor acted wrongfully, but rather, whether the acts were committed by him in the performance of functions of the sort normally regarded as part of the prosecutor's role under the judicial process.

Since prosecutorial functions and duties often and inevitably overlap with and are related to police activity, the nature of a prosecutor's acts need to be evaluated in light of all the facts and circumstances present and, hence, it would appear, require inquiry into the merits of the case. The mystery here is how a determination can be made on a motion to dismiss (which function is merely to test the legal sufficiency of the allegations of the complaint) if the trial court is required to adjudicate the merits of plaintiff's case. It appears that the logical inference to be drawn from *Robichaud* is that dismissal under Fed. R. Civ. P. 12(b)(6) is not proper in a case involving prosecutorial immunity.

If this correctly interprets the effect of *Robichaud* then the present motion to dismiss must, of course, be denied. But because the complaint in this case lacks specific allegations of police-type activity by Pachtmann, it would appear that Pachtmann should be dismissed if Fed. R. Civ. P. 12(b)(6) may be applied.

The complaint does allege that Pachtmann requested police officers to refrain from arresting a witness at Imbler's trial until Pachtmann had an opportunity to complete his examination of the witness. But this act appears to have been in furtherance of Pachtmann's alleged attempt to elicit courtroom testimony against Imbler and does not appear to have an independent basis for being deemed police activity such as was the case in *Robichaud*. There, plaintiff was caused by the prosecutor and police officers to be removed from jail, taken to the scene of the purported crime and there intimidated, unsuccessfully, in an attempt to obtain her confession. A much more substantial nexus between the alleged offending conduct of the prosecutor and police activity existed in *Robichaud* than is here presented. The only other basis for connecting the conduct charged in the present complaint with police activity is the alleged attempt to ascribe certain fingerprints and police sketches as those of Imbler. Though Pachtmann is not specifically charged with this conduct, it is alleged that he is "chargeable under federal law" with this conduct carried out by others.

Except for the portions of the complaint above referred to, the remaining allegations state, in substance, that Pachtmann produced perjured and false testimony in an attempt to convict Imbler. In other words, the prosecutor is alleged to have acted badly, perhaps wrongfully and even maliciously. Regardless of how limited the scope of prosecutorial activity may properly be, it would appear that the production of testimony is well within the traditional function of prosecutors no matter how wrongfully done and, hence, within the prosecutorial privilege.

For the foregoing reasons, the Court considers dismissal under Fed. R. Civ. P. 12(b)(6) is proper, and therefore,

IT IS ORDERED that the action be and the same is hereby dismissed as to defendant Richard Pachtmann.

Nonetheless, because of uncertainty whether the application of Fed. R. Civ. P. 12(b)(6) is permissible in light of *Robichaud* v. *Ronan*, *supra*, this Opinion and Order certifies, pursuant to Fed. R. Civ. P. 54(b), that

the Court expressly determines that there is no just reason for delay and expressly directs the entry of a final judgment dismissing the action as to the defendant Richard Pachtmann; accordingly,

IT IS FURTHER ORDERED that final judgment be entered herein dismissing the action as to defendant Richard Pachtmann.

IT IS FURTHER ORDERED that the Clerk of the Court send, by United States mail, copies of this Opinion and Order to all counsel herein.

DATED: June 30, 1972

/s/ Robert J. Kelleher
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil No. 71-123-RJK

PAUL KERN IMBLER, PLAINTIFF

vs.

RICHARD PACHTMANN, *et al.*, DEFENDANTS

JUDGMENT

An order having been entered herein on June 30, 1972, dismissing this action as to defendant Richard Pachtmann, and the Court, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, having certified therein that there is no just reason for delay and expressly directing the entry of final judgment,

IT IS ORDERED, ADJUDGED AND DECREED that the action be and the same is hereby dismissed as to the defendant Richard Pachtmann.

DATED: June 30, 1972

/s/ Robert J. Kelleher
United States District Judge

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 71-123 RJK

PAUL KERN IMBLER, PLAINTIFF

vs.

RICHARD PACHTMAN, *et al.*, DEFENDANTS

NOTICE OF APPEAL

The Plaintiff, PAUL KERN IMBLER, hereby appeals from the Judgment entered June 30, 1972, dismissing Defendant DISTRICT ATTORNEY RICHARD PACHTMAN and entering Judgment on behalf of defendant RICHARD PACHTMAN to the United States Court of Appeals for the Ninth Circuit.

DATED July 5, 1972.

HANSON & MILMAN

By: /s/ Roger S. Hanson,
ROGER S. HANSON,
Attorneys for Plaintiff

[Verification (omitted in printing)]

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 71-123-RJK

PAUL KERN IMBLER, PLAINTIFF

vs.

RICHARD PACHTMAN, *et al.*, DEFENDANTS

DESIGNATION OF RECORDS ON APPEAL

Plaintiff PAUL KERN IMBLER hereby designates the following as records on Appeal.

1. First Amended Complaint;
2. Motions to Dismiss filed on behalf of defendant RICHARD PACHTMAN;
3. Points and Authorities In Opposition to Motion to Dismiss filed by Plaintiff; and
4. Order and Judgment of June 30, 1972 granting dismissal as to RICHARD PACHTMAN.

Plaintiff desires no records pertaining to any defendant except RICHARD PACHTMAN.

DATED: July 5, 1972.

HANSON & MILMAN

By: /s/ Roger S. Hanson
ROGER S. HANSON
Attorneys for Plaintiff

[Verification (omitted in printing)]

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 72-2518

PAUL KERN IMBLER, PLAINTIFF-APPELLANT

v.

RICHARD PACHTMAN *et al.*, DEFENDANTS-APPELLEES

July 12, 1974

* * * *

Roger S. Hanson (argued) of Hanson & Milman, Beverly Hills, Cal., for plaintiff-appellant.

Richard G. Brungard, Deputy County Counsel (argued), Los Angeles, Cal., for defendants-appellees.

Before KOELSCH, HUFSTEDLER and KILKENNY, Circuit Judges.

KOELSCH, Circuit Judge:

This matter has a long history. In 1961 plaintiff-appellant Imbler was convicted on a murder charge in Los Angeles Superior Court and sentenced to death. The California Supreme Court affirmed. People v. Imbler, 57 Cal.2d 711, 21 Cal. Rptr. 568, 371 P.2d 304 (1962). Thereafter, Imbler's state habeas corpus petition was denied following an evidentiary hearing. In re Imbler, 60 Cal.2d 554, 35 Cal. Rptr. 293, 387 P.2d 6 (1963). A subsequent writ set aside the death penalty, In re Imbler, 61 Cal.2d 556, 39 Cal.Rptr. 375, 393 P.2d 687 (1964); and when the state declined to prosecute another "penalty trial," Imbler was given a life sentence.

In 1969 the United States District Court, concluding that Imbler's conviction was secured in part by testimony the prosecution knew, or had strong reason to know, was perjured, granted him a writ of habeas corpus. Imbler v. Craven, 298 F.Supp 795, 809 (1969). We affirmed, Imbler v. Craven, 424 F.2d 631 (9th Cir. 1970), cert. denied 400 U.S. 865, 91 S.Ct. 100, 27 L.Ed.2d 104.

Imbler then brought this suit for damages. So far as need be noticed, his allegations in substance are that the defendant Pachtman, the district attorney who prosecuted the criminal charges on behalf of the State of California, had knowingly, maliciously, etc., used perjured testimony to secure a conviction and hence was liable in damages for violation of his, Imbler's civil rights. The district judge dismissed Imbler's complaint as to Pachtman without leave to amend; he ruled that Pachtman, as a prosecuting attorney, enjoyed an immunity from suit for acts committed "in the performance of duties constituting an integral part of the judicial process . . .", Marlowe v. Coakley, 404 F.2d 70 (9th Cir. 1968); *see* Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965); and that as a matter of law the acts complained of came within a quasi-judicial prosecutorial function to which immunity attached. Imbler appeals.[1] We affirm.

[1, 2] The district court's dismissal of appellant's claim was consistent with our prior decisions. Ney v. State of California, 439 F.2d 1285 (9th Cir. 1971); Donovan v. Reinbold, 433 F.2d 738, 743 (9th Cir. 1970); Marlowe v. Coakley, *supra*; Clark v. Washington, 366 F.2d 678 (9th Cir. 1966); Robichaud v. Ronan, *supra*; Agnew v. Moody, 330 F.2d 868 (9th Cir. 1964); Harmon v. Superior Court, 329 F.2d 154 (9th Cir. 1964); Sires v. Cole, 320 F.2d 877 (9th Cir. 1963). The acts of the defendant which allegedly harmed appellant occurred during prosecutorial activities which can only be characterized as an "integral part of the judicial process." [2]

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[1] As appears from the caption, there are several defendants. In ruling against Imbler the court directed entry of judgment immediately, R. 54(b), F.R.Civ.P. The appeal from the ensuing limited judgment is thus valid.

[2] The dissent argues that deliberate suppression of evidence or subornation of perjured testimony is unprotected by quasi-judicial immunity because such acts, being improper exercises of prosecutorial power, are into an integral part of the judicial process; the dissent therefore concludes that our prior cases do not confer immunity when the complaint charges knowing and malicious abuse of prosecutorial power. The purported distinction undermines the purpose of the absolute immunity previously recognized, because the additions of an easy to make but difficult to prove charge of

All involved the questioning of a witness during the 1961 criminal prosecution.[a]

[3] Appellant, in effect, urges us to reject the doctrine of prosecutorial immunity and overrule a long line of this court's decisions. We decline to do so. The protection given a prosecutor acting in his quasi-judicial role protects not simply the prosecutor, but, more importantly, the effective operation of the judicial process, and hence the "common good." Because both the honest and dishonest are insulated, on occasion an injury without redress inevitably results; but, as well expressed by Judge Learned Hand:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The jurisdiction for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books." Gregorie v. Biddle, 177 F.2d 579 (2d Cir. 1949).

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knowing and malicious prosecutorial misconduct to any complaint would suffice to require a full trial on the merits of the prosecutor's conduct while acting as a judicial officer.

More importantly, the distinction is clearly inconsistent with our prior cases. In Robichaud v. Ronan, *supra*, the court indicated that a prosecutor's immunity is absolute when engaged in quasi-judicial activities, noting that no suit for malicious prosecution could be brought regardless of the existence of malice or even willfulness on the part of the prosecuting attorney. *See* 351 F.2d at 536. Equally in point is Marlowe v. Coakley, *supra*; the dissent's "monumental distinction" of *Marlowe* is spurious. The complaint there alleged that the prosecuting attorney knowingly and willfully, or with gross negligence, presented perjured testimony to the grand jury investigating plaintiff's activities and that he suppressed from the grand jury exculpating evidence within his knowledge, again willfully and deliberately. In ruling on the district court's dismissal under Rule 12(b)(6), the court necessarily had to evaluate the claim assuming that the charges of willful perjury and suppression were true. Notwithstanding these allegations, the court held that the district attorney, in presenting evidence to the grand jury, was acting within the scope of his duty to advise and present information to the grand jury, and that this function is an integral part of the judicial process. In short, the dissent's approach to prosecutorial immunity has been rejected in this circuit.

[a] Appellant contends the defendant engaged in non-immune police activity when he asked two police officers, seeking, during a recess in the trial, to discuss a criminal charge with the prosecution's chief witness, to wait until the end of the witness's testimony. We reject the contention. A prosecutor's request for an opportunity to complete an examination during a trial is a quasi-judicial act within the purposes of the immunity. More critically, the request to the police did not in itself deprive appellant of any civil right. Even if the defendant had then been acting in a police role, only the subsequent inducement of the testimony that the witness was trying to "straighten out," when the prosecutor had good reason to know the witness was in trouble, made the request to the officers legally relevant to appellant's civil rights; the questioning of a witness at trial is within a traditional prosecutorial function.

As indicated earlier, the issue is not *"res nova"* in this circuit.[4] The "balance between the evils inevitable in either alternative" has consistently been struck in favor of protecting honest criminal prosecution, at the expense of those injured by scoundrels,[5] by granting immunity from suit to all prosecutors.[6]

The judgment is affirmed.

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[4] The dissent's reliance on the Supreme Court's latest pronouncement on the subject of immunity. Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683. 40 L.Ed.2d 90 (1974), holding that state executive officials are not absolutely immune from suit, is misplaced. If anything, *Scheuer* tends to support our conclusion. The Court there recognized (*Scheuer* at 239 n. 4, 94 S.Ct. 1683; *see* Pierson v. Ray, 386 U.S. 547, 553-555, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967)) that the immunity of executive officers has historically "been of a more limited nature" than that of judicial officers—undoubtedly because the threat of private liability as a sanction for abuse of power is less necessary in the judicial system, which provides institutionalized systems of review to correct errors. Prosecutorial immunity is not a form of executive immunity, but rather a form of judicial immunity, Robichaud v. Ronan, *supra*, 351 F.2d at 536, designed to protect the judicial process; it attaches only to prosecutorial acts "constituting an integral part of the judicial process."

[5] The reference is general and not intended as personal.

[6] Appellant contends, in substance, that the district court's determination in the habeas proceeding established defendant's violation and therefore assures that an "innocent" prosecutor is not being made to face a trial and potential liability. Wholly aside from the fact that the California Supreme Court, on precisely the same facts available to the district court (the district court did not hold an evidentiary hearing and relied on the factual findings of the referee in the California Supreme Court's habeas proceeding), found there was no evidence that the prosecutor knowingly used perjured testimony. In re Imbler, *supra*, 60 Cal.2d at 565, 35 Cal. Rptr. 293, 387 P.2d 6, those determinations are not *res judicata* as to the defendant: he was not a party to the habeas proceeding. Here, as in any other § 1983 suit against a prosecutor, a determination of the claim would require a full trial. The burden and risk of that trial is precisely what the immunity is designed to prevent. If one prosecutor must face the risk of liability because of an ill-grounded exception to absolute immunity, then all potentially may, and the public purpose of the immunity is lost.

KILKENNY, Circuit Judge (dissenting):

Although appellant's 22 page amended complaint, with 23 pages of exhibits, is admittedly repetitious and in places ambiguous, there is no question but that it charges appellee, Pachtman, with knowingly, wilfully and maliciously using eight different items of false material testimony in securing appellant's initial conviction. If this is true, I believe that appellee violated appellant's procedural due process rights, and that he should be stripped of his official or representative character and subjected in his person to the consequences of his individual conduct.

The Supreme Court decision in Scheuer, Adm'x. v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), the most recent expression of the Court on the overall subject, convinces me that, on these charges, the appellee does not have quasi-judicial, or any other immunity. True enough, Scheuer involved state executive, rather than judicial immunity. However, the Court in Scheuer, analyzed the long history behind executive, as well as judicial immunity, and noted that there was a ". . . similarity in the controlling policy considerations in the case of high echelon executive officers and judges . . ." (94 S.Ct. at 1691, n. 8); the policy considerations revolving, in large measure, around the continued assurance that public officials will continue to vigorously perform their public functions without threat of harassment by civil suit. All this being said, the Supreme Court went on to hold that high executive officers do not have an unqualified immunity from civil suit. The Court emphasized:

> "Under the criteria developed by precedents of this Court, § 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer has 'the qualify of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the federal government.' Sterling v. Constantin, 287 U.S. 378, 397 [53 S.Ct. 190, 77 L.Ed. 375] (1932)." 94 S.Ct. at 1692.

If, as held in *Scheuer*, the highest executive officer of a great state is not clothed with absolute immunity and, assuming that the policy considerations behind executive immunity are similar to those behind judicial immunity, then it must necessarily follow that a prosecuting attorney, shielded only by a form of judicial immunity (Robichaud v. Ronan, 351 F.2d 533 (CA9, 1965)), should not be elevated to a status which would place him above the chief executive officer of his state. Otherwise, the office of the district attorney, rather than the Constitution of the United States, becomes the Supreme Law of the land. Of course, under our system of government, such a conclusion is clearly untenable. State officials in these circumstances should not escape the paramount authority of the Federal Constitution. I quote from Sterling v. Constantin, 287 U.S. 378, 398, 53 S.Ct. 190, 195, 77 L.Ed. 375 (1932):

> "When there is a substantial showing that the exertion of state power has overridden private rights secured by [the] Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression."

Aside from my view that *Scheuer* is controlling, the cases cited by the majority, in my opinion, are clearly distinguishable. For example, in Ney v. State of California, 439 F.2d 1285 (CA9 1971), the appellant charged the district attorney, or his deputy, with knowingly using altered tapes. The facts revealed, however, that the district attorney's deputy actually used the tapes and, therefore, if the district attorney could be sued at all, he would be liable only on a theory of *respondent superior*. In *Ney*, this court stressed that the allegation of fact supporting the purported misconduct was based on ". . . much conclusionary language . . . ." 439 F.2d at 1287. In the instant case, the factual allegations charge the district attorney with engaging in specific instances of misconduct wholly reprehensible to the integrity of the judicial process.

Donovan v. Reinbold, 433 F.2d 738 (CA9 1970), is no more enlightening. There, the action was against two city police officers and two city attorneys. The court held that the doctrine of immunity from civil suit under § 1983 would not bar an action against them. Nothing in *Donovan* even remotely indicates that a civil rights action should not lie on our facts. For that matter, the opinion recognizes that:

> "[t]he purpose of according judicial immunity is to protect the integrity of the judicial process. It is not to shield lawyers *or judges* from liability for the invasion of another's federally secured constitutional rights, when the alleged invasion did not occur during the performance of acts that are an integral part of the judicial process." 433 F.2d at 743. [Emphasis supplied]

To now hold, on our facts, that the knowing, wilful and malicious use of perjured testimony to gain a conviction, even though accomplished during the course of a trial, constitutes an integral part of the judicial process, flies in the very face of the integrity sought to be protected by judicial and quasi-judicial immunity.

The allegations in Marlowe v. Coakley, 404 F.2d 70 (CA9 1968) charged the prosecuting attorney with ". . . knowingly and wilfully, *or with gross negligence*, present[ing] perjured testimony to the grand jury . . . ." [Emphasis supplied] Needless to say, there is a monumental distinction between charging an officer with gross negligence in connection with the presentation of perjured testimony and charging him with knowingly, wilfully and maliciously *using* perjured testimony to obtain a conviction. Consequently, the decision of the *Marlowe* court could well rest on the failure of the complainant to clearly charge wilful misconduct in presenting the perjured testimony. *Cf.* Ney v. State of California, *supra*, 439 F.2d at 1287. The alternative does not equate with wilful action. I decline to hold that the shield of immunity should rest on the brow of a district attorney who *knowingly, wilfully and maliciously* utilizes perjured testimony to obtain a conviction. This conduct should

not be condoned as an *integral part of the judicial process.*

Clark v. State of Washington, 366 F.2d 678 (CA9 1966), recognizes the rule that a prosecuting attorney enjoys immunity under the Civil Rights Act only insofar as his prosecuting functions are concerned. At the risk of being repetitive, I again stress that appellee's acts, as charged in the amended complaint, had nothing to do with his *legitimate* prosecutory functions.

In Agnew v. Moody, 330 F.2d 868 (CA9 1964), cert. denied 379 U.S. 867, 85 S.Ct. 137, 13 L.Ed.2d 70, the court there sidestepped the contention that the doctrine of official immunity did not apply where the wrongful act was *of an extraordinary character*, as that phrase was used in Tenney v. Brandhove, 341 U.S. 367, 378-379, 71 SCt. 783, 95 L.Ed. 1019 (1951), by saying, "[i]f such an indefinite exception to the immunity rule exists, we are satisfied that appellant's case does not fall within it." 330 F.2d at 869. *Scheuer, supra*, makes it clear that the doctrine of official immunity does not apply in cases where the wrongful act is of an extraordinary character.

Hilliard v. Williams, 465 F.2d 1212 (CA6 1972), cert. denied 409 U.S. 1029, 93 S.Ct. 461, 34 L.Ed.2d 322, is closely in point. There, the court, in a civil rights action, recognized the general rule that a prosecuting attorney, when acting in his official capacity, is immune from a suit for damages. The court then goes on to hold that the doctrine of quasi-judicial immunity, normally shielding a prosecuting attorney, should not be extended to the situation where a complaint charges that the official deliberately suppressed material evidence which resulted in the conviction of the appellant. The court emphasized that such wilful conduct was ". . . outside [the officer's] quasi-judicial capacity and beyond the scope of 'duties constituting an integral part of the judicial process.'" 465 F.2d at 1218.

On the charges before us, I would hold that appellee acted entirely outside the scope of his jurisdiction and should not be permitted to shelter himself from liability by a plea that he was acting under the immunity of his

office. Not to be forgotten is the high responsibility accepted by a prosecuting officer when he enters upon the duties of his office. For example: (1) he is required to recognize that in our system of justice, the accused is to be given the benefit of all reasonable doubt; (2) his decisions during the course of the prosecution must be fair to all, including the defendant; (3) he has a duty of timely disclosure to the defense of all available evidence known to him that tends to help the defendant, and (4) it is his duty to seek justice, not pervert it by placing a conviction above the constitutional rights of the accused. It is time to recognize that prosecutors are not entirely above the law which holds other individuals financially accountable for their *international misdeeds.*

Needless to say, I express no opinion as to the merits of appellant's claims. I only say that on the basis of the allegations in the amended complaint, he is entitled to have a full-fledged judicial inquiry.

I would reverse.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-2518

PAUL KERN IMBLER, PLAINTIFF-APPELLANT

vs.

RICHARD PACHTMAN, DE WITT LIGHTNER, SANFORD MCCALEB, DONAL H. SEARS, KENNETH SCARCE, and ECTOR A. GARCIA, DEFENDANTS-APPELLEES

Before: KOELSCH, HUFSTEDLER and KILKENNY, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING IN BANC

Judges Koelsch and Hufstedler voted to deny the petition for panel rehearing and to recommend against a rehearing in banc. Judge Kilkenny voted to grant the panel rehearing and recommended that the in banc rehearing be granted.

The full court having been duly advised and no judge of the court in active service having requested a vote on the suggestion for rehearing in banc, the petition for rehearing is denied, and the suggestion for rehearing in banc is rejected.

SUPREME COURT OF THE UNITED STATES

No. 74-5435

PAUL KERN IMBLER, PETITIONER

v.

RICHARD PACHTMAN

ORDER ALLOWING CERTIORARI—Filed February 24, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-5435

PAUL KERN IMBLER,

Petitioner,

vs.

RICHARD PACHTMAN, District Attorney,

Respondent.

On a Petition for a Writ of Certiorari Directed to the Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION.

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IN THE

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RICHARD PACHTMAN, District Attorney,

Respondent.

On a Petition for a Writ of Certiorari Directed to the Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION.

Questions Presented.

1. Is there any substantial question as to whether a prosecutor has quasi-judicial immunity from suit under the Civil Rights Act for claims relating to his questioning of a witness in the course of a trial?

2. Is there any direct conflict among the circuits as to whether a prosecutor has quasi-judicial immunity from suit under the Civil Rights Act for claims relating to his questioning of a witness in the course of a trial?

3. Are the differing results between the decision of the Ninth Circuit in this case and the decisions of other circuits cited by petitioner explicable in terms of the different factual contexts of the decisions?

ARGUMENT.

I.

Introduction.

The antique dates of this Civil Rights Act damage claim and its convoluted progress to this point underline the need for quasi-judicial immunity for prosecutorial actions which constitute an integral part of the judicial process.

If petitioner were to prevail, deputy district attorney Pachtman would in 1975 be called upon to defend his actions in questioning witnesses during the 1961 murder trial of petitioner.

Petitioner would have it that whenever a convict wins a federal habeas corpus action he should have free rein to sue any state official who participated in his conviction. Such a rule would strain the already taxed state criminal justice system and would warp the habeas corpus procedure itself by introducing a new background element of potential damage actions.

The Ninth Circuit's decision in *Robichaud v. Ronan* (9th Cir. 1965) 351 F.2d 533 is the best exposition of the parameters of quasi-judicial immunity for prosecutors. That decision has been approved by other circuits in opinions including those relied upon by petitioner as supposedly indicating a conflict among the circuits. The present case clearly presents a case of prosecutorial quasi-judicial immunity within the purview of the *Robichaud* decision.

Certain decisions of other circuits, cited by petitioner and discussed herein, admittedly tend to confuse the concept of a defense or a qualified immunity with that of judicial immunity from suit. However, their holdings do not directly conflict with the holding in this case.

II.

Background of the Claim.

From reading the emotional petition filed in this case, one would believe that the defendant had by vilest of misdeeds secured the conviction of an innocent man. Such is not the case.

Petitioner herein was convicted of murder and assault with a deadly weapon for an incident committed on January 4, 1961 [C.R. 9]. Petitioner appealed his conviction to the California Supreme Court which in a full opinion reviewing the evidence held:

> "At the trial defendant denied participating in the crime. His defense consisted primarily of an alibi and impeachment of the identification witnesses. The evidence, however, was more than sufficient to establish that he did the shooting." *People v. Imbler* (1962) 57 Cal.2d 711, 713.

Petitioner then sought habeas corpus relief in the California courts. The California Supreme Court appointed Justice White, a retired Justice of that court, as a referee to take evidence concerning whether any witness who had testified against petitioner had committed perjury and, if so, whether any representative of the State had caused or suffered such to be knowingly introduced at trial or had suppressed evidence favorable to petitioner. Based upon the referee's findings, the California Supreme Court in a full opinion reviewing the facts held that no perjured testimony had been given and that no favorable evidence had been suppressed. *In re Imbler* (1963) 60 Cal.2d 554. On a later writ, the Supreme Court set aside the death penalty imposed on petitioner. *In re Imbler* (1964) 61 Cal.2d 556.

Several years later, the petitioner filed a federal habeas corpus petition alleging essentially the same bases for overturning his conviction. The district court did not conduct a separate hearing but merely reviewed the state court's record:

> "A federal evidentiary hearing on the petitioner's claims was not held since the same contentions were presented in the writ of habeas corpus before the California Supreme Court." *Imbler v. Craven* (C.D. Cal. 1969) 298 F.Supp. 795, 797.

Surprisingly, the district court in reviewing the record before the California Supreme Court, rejected the conclusions reached by that Court and its distinguished referee, despite the fact that the Supreme Court had noted that the referee ". . . had the opportunity to observe the witness [Costello] and judge his credibility and demeanor" as to the alleged perjured testimony (*In re Imbler, supra,* 60 Cal.2d at 562). *Imbler v. Craven, supra,* affirmed *Imbler v. California,* 424 F.2d 631 (9th Cir. 1970).

The district court concluded that certain "false," not perjured, testimony was given by two of the prosecutor's four identification witnesses which was material to their credibility. *Imbler v. Craven, supra,* 298 F. Supp. at 803. The district court found only that the prosecutor should have known of the "falsity," or incorrectness, of these items of testimony.

> "Therefore, as to each of the six items of false testimony described above, the court finds that the prosecutor had knowledge of such falsity, or, if he did not have actual knowledge, that he had reason to believe such testimony was false and his reckless use thereof in disregard of such reason is to be treated the same as knowing use of false testimony." *Imbler v. Craven, supra,* 298 F.Supp. at 809.

III.

Claim Relates to Acts Which Form Integral Part of Role of Prosecutor.

Petitioner's claims boil down to three activities of deputy district attorney Pachtman which petitioner alleges were performed in an unlawful manner. These activities were: (1) "charging" petitioner with the crimes of which he was convicted [C.R. 94, line 6]; (2) "convicting" petitioner of these crimes [C.R. 94, lines 7-8]; and (3) "knowingly" using "testimony at said trial via witnesses." [C.R. 96, lines 6-8].

Clearly, all of these activities are ones which form an integral part of the role of a prosecutor. The district court and the Ninth Circuit Court of Appeals so held:

> "The acts of the defendant [Pachtman] which allegedly harmed appellant occurred during prosecutional activities which can only be characterized as an 'integral part of the judicial process.' All involved the questioning of a witness during the 1961 criminal prosecution." *Imbler v. Pachtman* (9th Cir. 1974) 500 F.2d 1301, at 1302-1303 (footnotes omitted).

This is not a case of a prosecutor planning raids, investigating crimes, or planting evidence where the argument might be made that the prosecutor was not acting in his quasi-judicial capacity. Rather, the allegations are that the prosecutor here performed his prosecutional duties maliciously and in bad faith.

Unlike a defense, such as the defense of good faith, or the "qualified immunity" of executives from damages (*Scheuer v. Rhodes* (1974) .... U.S. ...., 40 L.Ed. 2d 90), judicial immunity bars suit and, consequent-

ly, inquiry into motive or purpose if the action is of the objective nature covered by the immunity.[1] The very purpose of judicial immunity as opposed to a defense or to a "qualified immunity" is to prevent the expenditure of time and energy and the resulting adverse effects of defending actions of a particular character.

> "The immunity doctrine would be of little value if such characterization of his motive could force the prosecutor to stand trial." *Hampton v. City of Chicago* (7th Cir. 1973) 484 F.2d 602, 608.

IV.

No Direct Conflict Among Circuits.

While several circuits have held that a claim may be stated against a prosecuting attorney for certain of his actions, there is no direct conflict between the holdings in these decisions and the instant case.

First, all of the cases have recognized that a prosecutor is entitled to quasi-judicial immunity for at least certain types of actions performed within the scope of his official duties as a prosecutor. *Hilliard v. Williams* (6th Cir. 1972) 465 F.2d 1212, 1217; *Hampton v. City of Chicago* (7th Cir. 1973) 484 F.2d 602, 608; *Holton v. Boman* (7th Cir. 1974) 493 F.2d 1176, 1178-1179; *Imbler v. Pachtman* (9th Cir. 1974) 500 F.2d 1301, 1302-1303.

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[1]Judicial immunity covers "*acts* within the judicial role"; similarly legislative immunity covers "legislative *acts* . . . in a field where legislators traditionally have the power to act." *Scheuer v. Rhodes, supra,* .... U.S. ...., 40 L.Ed.2d at 101 (emphasis added).

Second, all of these cases cite with approval the holding of the Ninth Circuit in *Robichaud v. Ronan* (9th Cir. 1965) 351 F.2d 533 in which the court said:

> "We believe, however, that when a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity—integral relationship between his acts and the judicial process—ceases to exist. If he acts in the role of a policeman, then why should he not be liable, as is the policeman, if in so acting, he has deprived the plaintiff of rights, privileges, or immunities secured by the Federal Constitution and laws? (Citations) To us it seems neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." *Robichaud, supra,* 351 F.2d at 536-537; see *Hilliard v. Williams, supra,* 465 F.2d at 1217; *Hampton v. City of Chicago, supra,* 484 F.2d at 608 (quoted in full); *Holton v. Boman, supra,* 493 F.2d at 1178 (quoted in full); and *Imbler v. Pachtman, supra,* 500 F.2d at 1302.

Third, the facts in each case permit the decisions to be read in a manner which poses no direct contradiction among the opinions of the circuits.

In this case, the actions complained of were restricted to courtroom questioning of a prosecution witness. *Imbler v. Pachtman, supra,* 500 F.2d at 1302. The case involves no out-of-court investigatory or police activities and no out-of-court activities in physically manufacturing or concealing evidence.

The *Hampton* case involved allegations of the planning and execution of a search and destroy raid on a Black Panther headquarters. *Hampton, supra,* 484 F.2d

at 608. Within the *Robichaud* definition, such activity might, subject to proof, constitute police rather than prosecutorial activity.

The *Holton* case cites *Hampton, supra,* as describing the law. *Holton v. Boman, supra,* 493 F.2d at 1178. The *Holton* complaint alleged that the prosecutor on specific dates engaged in activities to deprive the plaintiff of his property. The court concluded:

> "However, when he [the prosecutor] is properly alleged to be guilty of conduct *of a character not in the field of his prosecutorial authority or duty,* the pleading against him may not be dismissed as not stating facts which if proven would subject him to liability." *Holton v. Boman, supra,* 493 F.2d at 1179 (Emphasis added).

The *Hilliard* case treats us to a parade of horribles consuming almost three pages in the appellate reports. *Hilliard v. Williams, supra,* 465 F.2d at 1214-1217. Among the horribles are allegations that the prosecutor, having proof positive that there were no bloodstains on plaintiff's jacket, introduced evidence that there were such bloodstains, suppressed evidence that there were not such bloodstains, and kept the jacket concealed from plaintiff's counsel during trial. *Hilliard v. Williams, supra,* 465 F.2d at 1215-1216. The court concludes this list by holding:

> "We hold that factual averments of the complaint as summarized above, considered in a light most favorable to plaintiff, charge the District Attorney General with acts which were outside his quasi-judicial capacity and beyond the scope of 'duties constituting an integral part of the judicial process.'" *Hilliard v. Williams, supra,* 465 F.2d at 1218.

It should be noted that the quoted phrase 'duties constituting an integral part of the judicial process' finds no reference in the opinion. The well reasoned *Robichaud* decision instead discusses the "integral relationship between his acts and the judicial process." 351 F.2d at 536. Of course, it would never be a "duty" of the prosecutor to be malicious. However, the "act" of questioning a witness is an integral part of the judicial process, even if it were done with a malicious purpose.

The *Hilliard* court then concludes gratuitously that:

> "We are not willing to extend the doctrine of quasi-judicial immunity to a complaint charging the deliberate suppression of an FBI laboratory report establishing the innocence of the defendant." *Hilliard v. Williams, supra,* 465 F.2d at 1218.

While lacking the thorough theoretical analysis of the Ninth Circuit's decision in this case, and admittedly tending in a different direction, the *Hilliard* case does not directly contradict the holding in this case.

This case deals with the alleged eliciting of "false" testimony which tended to prevent the defense from obtaining information material to the impeachment of two of the prosecution witnesses. There was no suppression of any report or other evidence directly establishing the innocence of petitioner.

Hilliard is essentially an opinion dealing with facts rather than with an analysis of legal principles. Its scant statement of legal reasoning can and should be limited to the facts of the case, in which event there is no direct conflict between *Imbler* and *Hilliard*.

V.

Conclusion.

This case involves actions which are at the core of a prosecutor's quasi-judicial duties: the questioning of witnesses during a trial. If any part of a prosecutor's duties are to be immune from suit, the decision in this case must stand. The elective district attorney, of course, remains responsible for his actions to the electorate and, like judges, is subject to criminal sanctions for abuse of the civil rights of persons within his jurisdiction. *O'Shea v. Littleton* (1974) .... U.S. ...., 38 L.Ed. 2d 674, 687.

There is no necessary conflict between decisions of the Courts of Appeals relating to damage actions against prosecutors. The decision of the Ninth Circuit in this case is clearly correct and no further hearing is required. Therefore, the petition for writ of certiorari should be denied.

Dated: January 13, 1975.

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By JOHN P. FARRELL,
Deputy County Counsel.

Attorneys for Richard Pachtman.

Supreme Court, U. S.
FILED
MAY 1 1975
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5435

PAUL KERN IMBLER,

Petitioner,

v.

RICHARD PACHTMAN, District Attorney,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

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Rules of the Supreme Court of the United States:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5435

PAUL KERN IMBLER,

Petitioner,

v.

RICHARD PACHTMAN, District Attorney,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR PETITIONER

To the Honorable Warren E. Burger, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Comes now Petitioner Paul Kern Imbler by his Counsel, Roger S. Hanson, Esq., and presents his Opening Brief in support of reversal of that certain 2-1 decision of the United States Court of Appeals for the Ninth Circuit, *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974) (Pages 116 - 125, Appendix).

INTRODUCTION

This case brings before this Honorable Court for the first time the often-litigated, nationally-important issue of the scope of a district attorney's immunity to a Federal Civil Rights suit brought under 42 U.S.C. 1981 - 1986. *Holtan v. Boman*, 493 F.2d 1176, 1177 fn.2 (7th Cir. 1974); *Hampton v. City of Chicago*, 484 F.2d 602, 608 (7th Cir. 1973).

Past history has not favored plaintiffs in 42 U.S.C. 1983 lawsuits brought under the Federal Civil Rights Acts against State District Attorneys. Stemming from decisions of this Honorable Court granting *judicial* immunity, there has been engrafted upon the Federal Civil Rights statutes case made "quasi-judicial" immunity for prosecutors who are acting "within the scope of their prosecutorial function" or who nonetheless act in good faith, making discretional decisions, and as a consequence, inadvertently deprive a plaintiff of Civil Rights.

Nonetheless, several recent cases have tended toward piercing the veil of immunity in the umbrella shrouding the prosecutor who either wilfully deprives a person of rights and immunities guaranteed to him under the Federal Constitution, or who acts outside the scope of the normal prosecutorial function. The consequences of these late decisions are to create a conflict of authority in the Federal Circuits necessitating a definitive decision by this Honorable Court to resolve the discrepancy.

The instant case presents the question of the scope of immunity to be awarded to a Los Angeles County Deputy District Attorney who wilfully and knowingly suffered and used perjured testimony to cause the conviction and sentence to death of Petitioner Paul Kern Imbler in 1961.

Importantly, a Federal Writ of Habeas Corpus was granted in April, 1969 for, inter alia, the same illegal actions of the prosecutor which were the subject matter of the instant suit brought under 42 U.S.C. 1983. *Imbler v. Craven*, 298 F.Supp. 795 (C.D. California, 1969); Appendix, Pages 30 through 60.

Thus, there exists a clear threshold basis for this 42 U.S.C. 1983 suit, satisfying and countermanding one of the oft-quoted reasons for denying such lawsuits, frivolity, and lack of good faith and basis for the suit. *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949) (Appendix, Page 119).

While it must be admitted that respondent Pachtman was not a party to the 28 U.S.C. 2254 Writ of Habeas Corpus granted in this case, 298 F.Supp. 795 (C.D. Calif. 1969), (Appendix Pages 30 through 60), it is clear that his employer *was* a party and the factual and legal issues there litigated are difficult for someone in the position of Pachtman to now circumvent.

Thus the litigants to the instant Civil Rights suit do not write on a clean slate, and many of the oft-cited reasons for disallowing 42 U.S.C. 1983 suits against district attorneys vanish here.

Several Federal Circuits have enunciated purported arguments in support of prosecutorial immunity:

(1) the danger of influencing public officials by the threat of a lawsuit;

(2) the deterrent effect of potential liability on men who are considering entering public life;

(3) the drain on the valuable time of the official caused by unsubstantial suits [which would require inordinate private record keeping];

(4) the unfairness of subjecting officials to liability for the acts of their subordinates;

(5) the theory that the official owes a duty to the public and not to the individual;

(6) the feeling that the ballot and the formal removal proceeding are more appropriate ways to enforce honesty and efficiency of public officers.[1]

In the case at bar, only the *first* element would appear even possibly remotely appropos of the facts. It may be conceded that certain public officials may be influenced if potential illegitimate claims supported by formal suit awaited in the wings for every perceived transgression of their prosecutorial function, but we here deal with no different a problem than that faced by anyone who is sued spuriously; timely answers, demurrers, and discovery can dredge the unsupported claim to the surface so that it can be dismissed. As to item (2), it hardly appears to be an element of recruiting salesmanship used on new law school graduates to induce them to seek employment in the prosecutor's office, and certainly the bulk of new prosecutors commence their careers upon a foundation other than a belief that as long as they remain on the State's attorneys payroll, they are immune to Civil Rights suit no matter what their future transgressions may be; we are unwilling to accuse the nation's prosecutors of this state of mind. We suggest item (3) is not applicable because of the granting of relief *prior* to suit to this plaintiff under 28 U.S.C. 2254 for, inter alia, the very act which is the subject matter of the instant Civil Rights suit; it cannot be said that the suit is frivolous or is otherwise insubstantial. *Imbler v.*

[1] *Bauers v. Heisel*, 361 F.2d 581, 590 fn. 9 (3rd Cir. 1966 en banc); *Robichaud v. Ronan*, 351 F.2d 533, 535-536 (9th Cir. 1965; 66 Harvard Law Review 1285, 1295, N. 54 (1953); *Madison v. Gerstein*, 440 F.2d 338, 340, N. 5; Note, Civil Rights - Section 1983 - Prosecuting Attorney Held Immune From Civil Liability for Violation of Civil Rights Act, 42 N.Y.U.L. Rev. 160 (1967), *Littleton v. Berbling*, 468 F.2d 389, 412 (7th Cir. 1972).

Craven, 298 F.Supp. 795 (C.D. Calif. 1969). Item (4) is obviously not applicable, because the suit is here brought against the District Attorney who was *personally* responsible for the constitutional deprivation, the defendant Pachtman. We have sued neither his superiors nor his inferiors. Element (5) negates the usually considered role of the prosecutor – the prosecution of the guilty and protection of the innocent, i.e., the attorney for *all* of the people including even the defendant, and the defendant's rights are to be protected. In California, of course, item (6) is not here applicable, for only *the* District Attorney is reachable by the ballot box; an Assistant or Deputy, as is Pachtman, is a mere employee and can not be voted out of office. In spite of the acts established by the opinion granting habeas corpus, 298 F.Supp. 795 (C.D. Calif. 1969), we know of no removal proceedings against respondent Pachtman instituted by the State Bar, the Local Bar Associations, or the office of the Los Angeles County District Attorney. It would appear that no one in official capacity is concerned about the defendant's role of continuing employment as a Deputy Los Angeles County District Attorney. As well, element 6 may avoid *future* illegal deprivations of *future* victims of the aberrant prosecutor, but it provides no relief to his past victims. This petitioner can obtain no remedy for his immense financial loss and emotional drain by a mere removal of defendant Pachtman from the District Attorney's office.

Thus, the significant prayer in a 42 U.S.C. 1983 lawsuit for money damages for the emotional turmoil and drain of some four years spent on Death Row, constantly under the threat of execution by lethal gas, followed by some six additional years confinement under maximum security conditions, presents the only rational solution to the needs of the victim of the instant respondent Pachtman's foul deed.

The issue before this Honorable Court is whether the dismissal, before trial, of the instant Civil Rights suit was proper, where it is alleged that the prosecutor acted in a non-good faith, non-discretional area to knowingly suffer and allow prosecution perjury. To the resolution of that issue we devote this Brief.

The suit upon which relief was sought under 42 U.S.C. 1983 is set forth in the Appendix at Pages 61 through 88, incorporating the decision *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969), Appendix Pages 30 through 60 inclusive.

In *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969), the 28 U.S.C. 2254 Federal Writ of Habeas Corpus Order and Judgment granting relief to Petitioner Imbler, United States District Judge Warren J. Ferguson found that Respondent District Attorney Pachtman had violated certain trial precepts in at least the following:

1. Having knowledge that a key prosecution witness, Alfred John Costello had suffered at least three convictions of felonies, some of which resulted in Court-ordered confinements to state asylums for the mentally ill, Respondent Pachtman allowed Costello to testify to the jury that he, Costello, had *voluntarily* placed himself in said mental hospitals. While Pachtman was aware of the falseness of this testimony, he allowed it to stand uncorrected, using the rationalization that the jury could "decide" whether the commitment was voluntary or not. (298 F.Supp. 795, 806, Appendix Pages 30 through 60).

2. With knowledge provided by the F.B.I. "make-sheet" on Costello, the prosecutor respondent Pachtman, in seeking to rehabilitate his key witness Costello, led him into a story that was demonstrably false concerning his academic achievement; Costello was allowed to testify that he obtained a four-year degree in Industrial

Relations in two years from the University of California, and a second degree in engineering, a totally different academic subject, in *night school*, from the University of Southern California in 1954, although the prosecutor respondent Pachtman was aware that Costello was confined to San Quentin State Prison from 1951 through November of 1953, and had had a previous history of mental illness. (298 F.Supp. 795, 805, Appendix Pages 30 through 60).

3. With knowledge that Los Angeles Police Officers were then in the very Courtroom that the trial of Petitioner Imbler was taking place, waiting to arrest Costello for "bad check charges," Respondent Prosecutor Pachtman prevailed on them to refrain from arresting until he had finished with Costello, immediately thereafter leading Costello into testimony stating that he, Costello, was "trying to straighten himself out." This was false testimony elicited in an effort to create a false impression of Costello in the mind of the jury trying Petitioner Imbler for first-degree murder. That jury was eventually to vote the death penalty for Imbler. (298 F.Supp. 795, 807, Appendix Pages 30 through 60).

4. The Prosecutor Respondent Pachtman, with full knowledge that Costello had been convicted of at least *three* felonies, permitted Costello to testify that he had only been convicted of one felony. This was a failure to correct known false testimony. (298 F. Supp. 795, 807, Appendix, Pages 30 through 60).

5. Having access to police logs and having the police investigator at his side during trial, Respondent Prosecutor Pachtman knowingly let stand false evidence concerning whether prosecution witnesses Hillen and Costello had seen or had been shown pictures of petitioner Imbler prior to their viewing him in a police line-up. (298 F. Supp. 795, 806,

Appendix Pages 30 through 60). While it is not conclusively shown that Respondent Pachtman had perused the log, it is clear that the police officer investigator wilfully failed to correct the foregoing false evidence and that failure constituted a denial of due process of law to Petitioner Imbler.

6. With full knowledge that in the immediate past Costello had written several non-sufficient fund checks for relatively small amounts, the prosecutor led Costello into the demonstrably false story that he then was employed as an engineer for Carnation Dairies making "$9,000 - $10,000 per year;" in fact, Costello was an itinerant bum essentially without any gainful employment, and this fact was known to the prosecution team because of their intense contact with Costello on the Imbler murder trial. (298 F. Supp. 795, 802, 803, Appendix Pages 30 through 60).

The foregoing constitute the knowing use of false testimony and the failure to correct false testimony when the same was offered during trial, an express violation of the mandates of this Honorable Court in *Napue v. Illinois*, 360 U.S. 264, 269 (1959):

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence . . . " (298 F. Supp. 795, 803, Appendix Pages 30 through 60).

This Honorable Court further utilized and adopted the following language from *People v. Savvides*, 1 N.Y. 2d 554, 557, 154 N.Y.S. 2d 885, 887, 136 N.E. 2d 853, 854 - 855:

> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." (298 F. Supp. 795, 803, Appendix, Pages 30 through 60).

Essentially, the Federal District Judge, in dismissing the 42 U.S.C. 1983 suit against Defendant Respondent Pachtman, adopted the rationale that all of the foregoing acts of Pachtman were done in the course of his "traditional role" as a prosecutor, i.e., in the preparation of a witness for trial, the interrogation of that witness, and related areas commonly done by both the honest and dishonest prosecutor. (Appendix, Pages 104 through 113).

It is the position and thesis of this petitioner that the knowing use of perjured testimony by a prosecutor can never be within the scope of the *legitimate* prosecutorial function, and can not qualify for prosecutorial immunity under a 42 U.S.C. 1983 lawsuit. Such can not be the good-faith, discretionary act commonly held to insulate the prosecutor from liability. *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974), the case here under review, split 2 - 1 on this issue.

It is safe to state that the instant case clearly pinpoints the issue for resolution on a national basis.

Other leading circuits have granted plaintiffs the right to bring suit against the prosecutor under quite similar circumstances. *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972). Appendix A-1, this brief.

It is clear that this Honorable Court, in a host of decisions, has clearly held it to be a Denial of Due Process of Law for a prosecutor to knowingly use

perjured testimony to achieve a criminal conviction. *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935); *Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967); *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); *Hysler v. Florida*, 315 U.S. 411, 62 S.Ct. 688, 86 L.Ed.932 (1942); *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942); *Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 692 (1967); *White v. Ragen*, 324 U.S. 760, 65 S.Ct. 978, 89 L.Ed. 1348 (1945); *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *DeMarco v. United States*, 415 U.S. 449, 94 S.Ct. 1185, 39 L.Ed.2d 501 (1974); and the cases cited in each opinion.

In view of this overwhelming authority, it is clear that this prosecutor knew, or with any consideration must reasonably have known, that his perpetrations were non-good faith, non-discretionary acts that were absolutely prohibited in any criminal prosecution. Thus, he acted illegally and wilfully and should not be heard to defend by contending that any and all of his acts should be insulated from judicial review in the Federal Court system under 42 U.S.C. 1983. The scope of immunity to be accorded to the nation's errant and aberrant prosecutors is thus to be resolved in this case of national import.

OPINIONS BELOW

There are several opinions below of significance to the development of this case. They are *People v. Imbler*, 57 Cal. 2d 711, 21 Cal. Rptr. 568, 371 P.2d

304 (1962); *In re Imbler*, 60 Cal. 2d 554, 35 Cal. Rptr. 293, 387 P.2d 6 (1963); *In re Imbler*, 61 Cal. 2d 556, 39 Cal. Rptr. 375, 393 P.2d 687 (1964); *Imbler v. Oliver*, 397 F.2d 277 (9th Cir. 1968); *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969); *Imbler v. State of California*, 424 F.2d 631 (9th Cir. 1970), cert. den. 400 U.S. 865, 91 S.Ct. 100, 27 L.Ed.2d 104. In addition, of course, is the opinion now sought review before this Honorable Court, *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974).

Several of these are contained in the single appendix: *People v. Imbler*, 57 C.2d 711 (Pages 8 through 14); *In re Imbler*, 60 C.2d 554 (Pages 14 through 29); *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969) (Pages 30 through 60); *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974) (Pages 116 through 125).

JURISDICTION

The grounds upon which the jurisdiction of this Court is invoked are 28 U.S.C. Section 1254 (1). The other grounds upon which the jurisdiction of this case is invoked are a severe and clear-cut conflict of decisions in the various circuit courts of appeals in the United States. A further ground upon which the jurisdiction of this Honorable Court is invoked is a denial of equal protection of the law and deprivation of rights to bring a lawsuit under 42 U.S.C. 1983 in the courts governed by the United States Ninth Circuit, whereas had petitioner been able to bring his lawsuit in the Fourth, Fifth, Sixth, Seventh, or Eighth Circuit, his cause of action would not have been dismissed under the allegations of the complaint. The jurisdiction is

further invoked under this Court's power to resolve critical issues of national importance.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States, which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It involves the grant of the Federal Writ of Habeas Corpus under 28 U.S.C. 2254 which provides:

28 U. S. CODE SEC. 2254

§2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State

corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit–

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such a factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determinations, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous. (c) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the

existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding. As amended Nov. 2, 1966, Pub.L. 89-711, § 2, 80 Stat. 1105.

It also involves 42 U.S.C. Section 1981 - 1986, which provides:

TITLE 42

EQUAL RIGHTS UNDER THE LAW

§1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (RS §1977.)

From Act May 31, 1870, c 14, §16, 16 Stat 144.

TITLE 42

PROPERTY RIGHTS OF CITIZENS

§1982. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit,

purchase, lease, sell, hold and convey real and personal property. (RS §1978.)

From Act Apr. 9, 1866, c 31, §1, 14 Stat 27.

TITLE 42

CIVIL ACTION FOR DEPRIVATION OF RIGHTS

§1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (RS §1979.)

From Act Apr. 20, 1871, c 22, §1, 17 Stat 13.

TITLE 42

CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS

§1985. First. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while

engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Second. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grant or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Third. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to

vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support of advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. (R.S. §1980.)

From Act July 31, 1861, c 33, 12 Stat 284; April 20, 1871, c 22, §2, 17 Stat 13.

TITLE 42

ACTION FOR NEGLECT TO PREVENT CONSPIRACY

§1986. Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section [§1985 of this title], are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable dilligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect

or refusal may be joined as defendants in the action, and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued. (RS §1981.)

From Act April 20, 1871, c 22, §6, 17 Stat 15.

ISSUES TO BE RESOLVED AND QUESTIONS PRESENTED

(1) To resolve and define on a national level the recurring issue and problem of the liability of a District Attorney to a lawsuit brought against him under the Federal Civil Rights Act, 42 U.S.C. 1983, and related statutes, an issue never fully considered and adjudicated by this Honorable Court.

(2) To resolve whether the knowing use of perjured testimony by a Deputy District Attorney to obtain a conviction for first degree murder and sentence of death is an act for which that Deputy District Attorney shall receive carte blanche immunity under 42 U.S.C. 1983, disenabling his victim from bringing a Federal Civil Rights Lawsuit for money damages.

(3) To resolve the conflict which now exists in the United States Court of Appeals for several of the federal circuits which have considered the above issue and which have rendered conflicting opinions within the

meaning of Rule 19, Rules of the Supreme Court of the United States.

(4) To decide whether when, as here, a Federal Writ of Habeas Corpus has already been granted in the instant case for the knowing use of perjured testimony on the part of a Los Angeles County Deputy District Attorney by a United States District Judge, and affirmed by the Ninth Circuit, it is appropriate to dismiss before trial, on the filed pleadings, petitioner's lawsuit against the Deputy District Attorney brought under 42 U.S.C. 1983 and related statutes.

(5) To decide whether a Deputy District Attorney, an arm of the *executive branch* of state and county government, shall any longer be accorded any immunity under 42 U.S.C. 1983 following the decision of this Honorable Court in *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90, 42 U.S.L.W. 4543, April 17, 1974.

(6) To decide whether the knowing use of perjured testimony by a Deputy District Attorney to achieve a conviction for murder in the first degree with a resulting death sentence is an act within the normal prosecutorial function or role of a prosecuting attorney such as to insulate the said district attorney from a Federal Civil Rights lawsuit brought under 42 U.S.C. 1983 and related sections.

(7) To determine whether petitioner Paul Kern Imbler is receiving equal protection of the law in the Federal Ninth Circuit when his suit against a Deputy District Attorney under 42 U.S.C. 1983 is dismissed, whereas had the Deputy District Attorney carried out his dastardly act of knowingly using perjury in another Federal Circuit the said act would provide a basis for cause of action, citing in particular the Sixth Circuit decision *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972) allowing said lawsuit; said Sixth Circuit decision, *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972) is herewith appended for the convenience of this Honorable Court in support of the assertion that a severe conflict now exists in the Federal Circuits. (Appendix A-1, this brief.)

(8) Whether, if the asserted "immunity" enjoyed by a District Attorney stems from an alleged "quasi-judicial" position occupied by a District Attorney, a judge should be given immunity in any case where he knowingly suffers or allows perjured testimony to occur in his courtroom in any criminal proceeding; whether if such a judge who knowingly suffers or allows perjury to occur in his court when offered by the prosecution should not receive immunity, whether then a District Attorney should be granted "quasi-judicial" immunity.

(9) Whether, given a violation of federal civil rights, a cause of action against a Deputy District Attorney under 42 U.S.C. 1983 should be allowed to stand, at least under the limited circumstances present in the case at bar, where:

a. the District Attorney *has already been found* by a United States District Judge to have knowingly used perjured testimony to convict the petitioner Paul Kern Imbler, 298 F. Supp. 795 (C.D. Calif. 1969);

b. this finding was made during procedures leading to the grant of a petition for writ of habeas corpus under 28 U.S.C. 2254 for, inter alia, the knowing use of perjured testimony to convict the petitioner Paul Kern Imbler, on the part of the defendant herein, Deputy District Attorney Richard Pachtman.

(10) Whether, in view of the substantial number of cases now in record involving 42 U.S.C. 1983 lawsuits

against District Attorneys in the Federal Circuit Courts of Appeals reaching conflicting results, this Honorable Court should finally resolve the conflict of authority now existing between the Ninth Circuit and such other circuits as the Fifth, Sixth, and Seventh Circuits. See *Hilliard v. Williams* 465 F.2d 1212 (6th Cir. 1972) Appendix A-1.

SUMMARY STATEMENT OF FACTUAL BACKGROUND OF CASE.

The litigation now pending before this Honorable Court has at least a 15-year history dating back to circa 1961.

On August 10, 1961, Petitioner Paul Kern Imbler was convicted of one count of first degree murder and one count of assault with a deadly weapon with intent to commit murder. At that trial he was prosecuted by Respondent Deputy District Attorney Richard Pachtman of the Los Angeles County District Attorney's staff. Imbler was represented by an assigned Deputy Public Defender, one James P. Nunnelley.

The judgment was affirmed unanimously by the Supreme Court of the State of California on automatic appeal as provided by California Penal Code Section 1239(b). *People v. Paul Kern Imbler*, 57 Cal.2d 711, 21 Cal. Rptr. 568, 371 P.2d 304 (1962), Single Appendix Pages 8 through 14. Following Imbler's alleging that his conviction was obtained by the knowing use of perjured testimony on the part of the prosecution and certain Los Angeles Police officers, and moreover by virtue of suppression of fingerprint evidence tending to exonerate him, the California Supreme Court ordered an evi-

dentiary hearing. A retired Supreme Court Justice, the Honorable Thomas White, was appointed as a fact-finding referee. After consideration of the evidence presented and consideration of the referee's findings of fact and conclusions of law, the California Supreme Court denied relief. *In re Imbler*, 60 Cal.2d 554, 35 Cal. Rptr. 293, 387 P.2d 6 (1963), Cert. denied 379 U.S. 908, 85 S.Ct. 196, 13 L.Ed.2d 181 (1964) (Single Appendix, Pages 14 through 29). Shortly thereafter, a second petition for Writ of Habeas Corpus in the California Supreme Court succeeded in setting aside the Death Penalty for errors condemned by that Court in *People v. Morse*, 60 Cal.2d 631; *In re Imbler*, 61 Cal.2d 556, 39 Cal.Rptr. 375, 393 P.2d 687 (1964). Thus Petitioner Imbler spent nearly four years constantly under threat of execution in the California gas chamber at San Quentin Penitentiary. After the setting aside of the death sentence, the prosecution elected to stipulate to a life sentence rather than retry the penalty, and Imbler was removed from Death Row and eventually confined in the State maximum security penitentiary at Folsom. He was to remain there until March 24, 1971, when he was formally set free as a result of a grant of a Federal Writ of Habeas Corpus under 28 U.S.C. 2254 by United States District Judge Warren J. Ferguson of the Central District of California. *Imbler v. Craven*, 298 F.Supp. 795, 812 (C.D. Calif. 1969). (Single Appendix, Pages 30 through 60.) Prior to obtaining relief under 28 U.S.C. 2254, Imbler successfully prevailed in the U.S. Ninth Circuit to allow the District Court to consider his petition, he taking advantage of the change in Federal Habeas Corpus law wrought by this Honorable Court in overruling *McNally v. Hill*, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1931)

by *Peyton v. Rowe*, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968). *Imbler v. Oliver*, 397 F.2d 277 (9th Cir. 1968).

Following the grant of relief under 28 U.S.C. 2254, Imbler prevailed in efforts of the State of California to appeal to the U.S. Ninth Circuit, *Imbler v. Craven*, 424 F.2d 631 (9th Cir. 1970), cert. den. 400 U.S. 864.

In 1971, Petitioner Imbler brought the instant civil rights suit under 42 U.S.C. 1983 against Deputy District Attorney Pachtman and various members of the Los Angeles Police Department for, inter alia, the knowing use of perjured testimony by Pachtman and suppression of evidence favorable to him. *Napue v. Illinois*, 360 U.S. 264; *Mooney v. Holohan*, 294, 103; *Giles v. Maryland*, 386 U.S. 66; *Alcorta v. Texas*, 355 U.S. 28; *Hysler v. Florida*, 315 U.S. 411; *Pyle v. Kansas*, 317 U.S. 213; *Miller v. Pate*, 386 U.S. 1; *Brady v. Maryland*, 373 U.S. 83, 87; and the cases therein cited, as compiled in *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969).

United States District Judge Robert J. Kelleher dismissed the suit against Respondent District Attorney Richard Pachtman but left the suit intact against the defendant police. (Single Appendix, Pages 104 - 113); *Monroe v. Pape*, 365 U.S. 167; by analogy, see *Webster Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); which, while not dealing with the defendants acting under color of *state* law, is apparently instructive as a Federal Judicially created counterpart.

On appeal, the United States Court of Appeals for the Ninth Circuit split 2 - 1 in affirming the dismissal. *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974) (Single Appendix, pages 116 through 125).

A petition for rehearing and a suggested hearing *En Banc* were similarly rejected by a 2 - 1 vote (Single Appendix, Page 126).

The United States Supreme Court granted certiorari on February 24, 1975 (Single Appendix, Page 127).

The case presents for determination the nationally consequential issue of the scope of immunity to be accorded to the prosecution state's attorney in a Federal Civil Rights suit brought under 42 U.S.C. 1983 and related statutes. It is an issue not ever fully resolved by this Honorable Court, and an issue apparently creating a conflict in results among the leading United States Courts of Appeals which have considered the issue. See, for example, and compare *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972) with the instant case, *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974). (Appendix A-1; Single Appendix, 30-60, this brief inclusive.)

SUMMARY OF SIGNIFICANCE OF DEPRIVATION OF FOURTEENTH AMENDMENT DUE PROCESS OF LAW PERPETRATED BY RESPONDENT PROSECUTOR PACHTMAN

Paul Kern Imbler, petitioner herein, was tried for and convicted of the murder of one Morris Hasson, a proprietor of a small Los Angeles grocery store run by Hasson and his wife. No apparent motive appeared for the crime. Two men entered the store on the evening of the crime and made no demand for money. One of them shot Hasson without saying a word. Mrs. Hasson survived but failed to identify Imbler as one of the perpetrators.

One Alfred Costello was a spectator to the crime from a vantage position across the street. He noted the emergence of the two men from the store and gave chase, the killer unsuccessfully firing a gun shot at Costello. To aid in his escape, the killer quickly removed a topcoat and discarded it. Contained in the coat was the gun and a plastic safety razor case.

Costello was to eventually testify at Imbler's trial, naming Imbler as one of the culprits.

During cross-examination, Imbler's Court-appointed public defender inquired of Costello whether in fact Costello had been in an insane asylum. Costello falsely answered that he had voluntarily placed himself in the mental hospital. The prosecutor knew that in fact Costello had been committed there because of being found not guilty by reason of insanity by the Los Angeles Superior Court in at least one criminal case. This constituted a violation of *Napue v. Illinois*, 360 U.S. 264, a failure to correct known false testimony when it was offered. In an effort to rehabilitate Costello before the jury, Prosecutor Richard Pachtman, respondent herein, led Costello into a series of inherently incredible accomplishments, concerning Costello's education achievements, the bulk of which were allegedly attained at a time when Costello was either commited to the insane asylum or was physically in San Quentin State Prison. Thus, Pachtman led Costello to testify that he obtained a four-year Bachelor's degree in Industrial Relations from the University of California in the genius-level time of but two years and that he followed this with a degree in engineering from the University of Southern California in night school, obtaining that degree in 1954. Official records placed Costello in San Quentin State Prison

from 1951 through November, 1953. The prosecutor, after soliciting this false evidence, again failed to correct it. In a further effort to bolster Costello, the prosecutor elicited from him the statement that he, Costello, was then endeavoring to "go straight" by being employed as an engineer with the Los Angeles based Carnation Milk Company, making an average of $9,000 - $10,000 per year for the last four years. The prosecutor knew of this falsehood, for at the very instant Los Angeles Police were awaiting the conclusion of Costello's testimony in order to affect his arrest for "bad check charges." At Respondent Prosecutor Pachtman's request, the police had refrained from the arrest until Pachtman concluded use of Costello, the latter being the State's key witness against Imbler. In addition, although possessing knowledge that Costello had been convicted of at least three felonies, Pachtman allowed Costello to admit to but one felony conviction.

Other police-related violations of the Due Process rights of Petitioner Imbler such as the police-related falsification of key fingerprint information occurred in the case, the summary of which can be found in *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969) (Appendix Pages 30 through 60).

At issue before this Court is whether such wilful violations of Due Process of Law and of the constitutional rights of Paul Kern Imbler, and which were instrumental in causing the grant of relief under 28 U.S.C. 2254, *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969), are *discretional* acts *within the normal scope of the prosecutorial function* so as to isolate Respondent District Attorney Pachtman from a Civil Rights suit under 42 U.S.C. 1983.

It is the petitioner's contention that the performance of the foregoing illegal and unprofessional non-discretionary acts strip the cloak of immunity from the shoulders of the prosecutor and give rise to a Civil Rights cause of action under 42 U.S.C. 1983. *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972). Because of the prohibited nature of such acts, "good faith" performance can be no defense. *Mooney v. Holohan*, 294 U.S. 103; *Pyle v. Kansas*, 317 U.S. 213; *Alcorta v. Texas*, 355 U.S. 28; *Hysler v. Florida*, 315 U.S. 411; *Miller v. Pate*, 386 U.S. 1; *Giglio v. United States*, 405 U.S. 150; *Napue v. Illinois*, 360 U.S. 264; *DeMarco v. United States*, 415 U.S. 449; *United States v. Butler*, ____ F.2d ____ (9th Cir. 1974); *Imbler v. Craven*, 424 F.2d 631 (9th Cir. 1970), cert. den. 400 U.S. 865 (1971).

It is clear that this respondent, an experienced prosecutor, knew, or *should have known with the exercise of any element of consideration*, that his acts were illegal deprivations of Due Process of Law and had been already condemned in a multiplicity of rulings by this Honorable Court. The foregoing illegal and unprofessional prohibited prosecutorial acts are not acts of discretion and because of their nature can not realistically be considered to be within the normal prosecutorial function. As such, the prosecutor can be accorded no immunity, and liability must lie in a 42 U.S.C. 1983 lawsuit.

SUMMARY OF ARGUMENT

I.

The decided cases giving immunity to a District Attorney against a Federal Civil Rights lawsuit brought against him under 42 U.S.C. 1983 and related statutes usually base that immunity on the assertion that he must be protected when he is making

(1) good faith discretional decisions
(2) within the scope of the normal or usual prosecutorial function or duty.

Petitioner was granted a Federal Writ of Habeas Corpus under 28 U.S.C. 2254 in the Central District of California in April, 1969 by United States District Judge Warren J. Ferguson. *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969) (Appendix, Pages 30 through 60). Inter alia, that Writ of Habeas Corpus was granted for the knowing use of perjured testimony used to achieve the conviction by the respondent herein, Los Angeles County District Attorney Richard Pachtman.

Speaking generally, the past history of 42 U.S.C. 1983 lawsuits directed against state prosecutors has not been favorable to the plaintiffs. In general, the Federal District Courts have been quick to grant immunity under the aegis of a "quasi-judicial" role occupied by the prosecutor. In a same general vein, the Federal Circuit Courts have found such similar immunity.

The exceptions have taken at least two recognized forms:

(1) A finding that the prosecutor had abandoned his role as a prosecutor, embarking into a non-prosecutorial function, with the rationale

that he should not then be given his cloak of protection;[1]

or much less prevalent,

(2) an outright rejection of the quasi-judicial immunity even though the prosecutor was apparently functioning fully within his mechanical role as a prosecutor;[2]
that is, the prosecutor's act is deemed sufficiently flagrant that he was denied the umbrella of immunity even though the act was an "integral part" of the prosecutorial function. The latter type of case is the one at bar and the one we seek to establish non-immunity therein.

Some cases[3] have overtly held that *illegal* acts of the prosecutor, even though done in the actual trial in the actual courtroom scenario, are not within the *legitimate* scope of the prosecutorial function, and have suggested that under those circumstances suit should lie under 42 U.S.C. 1983.

Under the decided cases of this Honorable Court, as well as other leading Federal and State Courts, the knowing use of perjured testimony by a prosecutor to achieve a criminal conviction is not

(1) done in good faith;
(2) a discretionary act, but in fact is absolutely forbidden;
(3) within the legitimate scope of the duties of a state prosecutor.

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[1] *Robichard v. Ronan*, 351 F.2d 533 (9th Cir. 1965)

[2] *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972); *Imbler v. Pachtman*, 500 F.2d 1301, (9th Cir. 1974) (Kilkenny, C.J., dissenting)

[3] *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974) (Kilkenny, C.J., dissenting)

Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed 791 (1935); *Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed. 2d 737 (1967); *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); *Hysler v. Florida*, 315 U.S. 411, 62 S.Ct. 688, 86 L.Ed. 932 (1942); *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942); *Evans v. Eyman*, 363 F.2d 540, 542 (9th Cir. 1966); *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969); *Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed. 2d 690 (1967); *White v. Ragen*, 324 U.S. 760, 65 S.Ct. 978, 89 L.Ed. 1348 (1945); *In re Ferguson*, 5 Cal. 3rd 525. Compare *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963) for similar principles. See also *Ashley v. Texas*, 319 F.2d 80 (5th Cir. 1972), cert. den. 375 U.S. 931, 84 S.Ct. 331, 11 L.Ed.2d 263 (1963); *Jackson v. Wainwright*, 30 F.2d 288 (5th Cir. 1968) (collecting cases); compare *Lessard v. Dickson*, 394 F.2d 88 (9th Cir. 1968), especially noting dissent by Ely, Circuit Judge; *Levin v. Katzenbach*, 124 U.S. App. D.C. 158, 363 F.2d 287 (1966); *Luna v. Beto*, 395 F.2d 35 (5th Cir. 1968); *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964); compare *United States v. Keogh*, 391 F.2d 138 (2d Cir. 1968); see also *Nash v. Illinois*, 389 U.S. 906, 88 S.Ct. 222, 19 L.Ed.2d 223 (J. Fortas, C.J. Warren, J. Douglas dissenting from Denial of Certiorari).

Because the knowing use of perjured testimony by a prosecutor to achieve a criminal conviction is not an act of good faith discretion within the *legitimate* scope of prosecutorial duties, there should be no immunity accorded to the prosecutor, and suit under 42 U.S.C.

1983 and related statutes must not be dismissed on the face of the pleadings.

At least one major Federal Circuit has held that this sort of illegal prosecutorial behavior is not insulated from suit under 42 U.S.C. 1983. *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972). (Appendix A-1, this brief)

II.

At least where a Federal Writ of Habeas Corpus under 28 U.S.C. 2254 has been granted for, inter alia, the knowing use of perjury on the part of the prosecutor, the suit should lie; the usual rationale offered for disallowing said lawsuits then no longer appertains, and the prosecutor cannot be said to be required to dissipate his time defending spurious, unsubstantial lawsuits.

III.

Presently existing law makes clear that some of the acts of Prosecutor Pachtman were in the nature of a police function, and hence are today not protected under the concept of "quasi-judicial" immunity in any event.

IV.

The prosecutor is an arm of the executive branch of government, and thus is amenable to suit within the meaning of the decision of this Honorable Court in *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); his "immunity" can no longer be said to "derive" from that "enjoyed" by a member of the judiciary.

V.

If the prosecutor knew, or reasonably should have known, that his behavior would result in the deprivation of the Civil Rights of a party he was then prosecuting, he will be held liable. *Wood v. Strickland*, ____ U.S. ____, 43 L.Ed.2d 214, 95 S.Ct. 992 (1975) (Appendix A-2, this brief). This is under a *negligence* theory as opposed to a theory of wilful misconduct.

ARGUMENT

I.

THE KNOWING USE OF PERJURED TESTIMONY BY A PROSECUTOR, EVEN WHEN DONE DURING THE TRIAL PROCEDURES IN A STATE CRIMINAL PROSECUTION FOR MURDER, IS NOT A GOOD-FAITH ACT OF DISCRETION WITHIN THE SCOPE OF LEGITIMATE PROSECUTORIAL DUTIES SO AS TO INSULATE THE PROSECUTOR AGAINST LIABILITY IN A 42 U.S.C. 1983 FEDERAL CIVIL RIGHTS SUIT.

The multitude of cases cited within this argument and elsewhere in this brief indicate a general immunity against Federal Civil Rights liability under 42 U.S.C. 1983 to a District Attorney or Government prosecutor who is honestly acting within the scope of his standard prosecutorial function, for his good faith discretionary acts.

The considered analysis of the cases indicate several principles:

1. If the prosecutor acts outside the scope of the role normally assumed by a prosecutor, such as becoming a quasi-policeman, exercising a police-oriented role, the immunity is lost. Thus a prosecutor who plans or participates in warrantless raids, or searches and seizures, or who coerces confessions, or who actively moves witnesses out of the consulting range of their counsel has been deemed to be performing police-related functions rather than prosecutorial functions, and the immunity has been lost. Thus, a broad, but much smaller, category of 42 U.S.C. 1983 cases recognize that a prosecutor is not immune to suit brought under the statute if the prosecutor acts in a role other than "quasi-judicial," or other than in his usual role as an attorney for the Government or State, performing functions normally considered to be part of that prosecutorial role.[1]

[1] *Balistrieri v. Warren,* 314 F.Supp. 824 (W.D. Wis. 1970) (Wisconsin State Attorney General, his assistant and others at his direction entered plaintiffs liquor bar during the evening, checking customers' identification and liquor supplies, "stopping the operation of plaintiff's business;" held, sufficient behavior as a *police function* to require denial of motion to dismiss under the quasi-immunity doctrine of the prosecutor.) *Robichard v. Ronan,* 351 F.2d 533 (9th Cir. 1965) (Arizona State Prosecutor participated in confining female juvenile in "drunk tank" with female adult prisoners for 25 days without according preliminary hearing, attempting to coerce a confession, forcing juvenile to go unwillingly to scene of crime to induce a confession, telling the juvenile that only the sheriff and the prosecutor could help her even though she had counsel, and then only if she told them the "truth," and further holding the juvenile without any initial probable cause; held, prosecutor acting in the traditional *police role* shall not remain under the cloak of quasi-judicial immunity.) *Lewis v. Brautigam,* 227 F.2d 124, 55 A.L.R.2d 505 (5th Cir. 1955) (State's Attorney held not to have acted within scope of jurisdiction or as authorized by law by attempting coerced guilty plea to criminal charges, directing deputy sheriffs to remove criminal defendant from jail to state prison 300 miles away to thwart defense attorneys from preparing defense to murder charge; if prosecutor directs police in unlawful manner, the prosecutor abandons his "quasi-judicial" immunity and becomes in effect a policeman who has no similar immunity.) See also *Corsican Productions v. Pitchess,* 338 F.2d 441 (9th Cir. 1964). In *Donovan v. Reinbold,* 433 F.2d 738 (9th Cir. 1970) (City Attorneys not given 42 U.S.C. 1983 immunity when they are giving legal advice to a public entity in respect of matters that are not the subject of pending litigation; these acts were not an integral part of the judicial process.

2. If the prosecutor remains within the normal role commonly conceded to be the day-to-day tasks performed by a prosecutor, he is to be given immunity for the *discretionary acts done by him* in the *good faith* performance of his *normal* prosecutorial role.[2] Thus, surely the decision whether to prosecute or not based on a good faith evaluation of evidence presented has insulated the prosecutor from a 42 U.S.C. suit for malicious prosecution, and it can be conceded that it should, and that he should be provided with that immunity. The cases are

many and varied, and the bulk of them indicate that the prosecutor was performing his task in an honest manner within the normal scope of his duties. As should be evident from a perusal of the cases sampled and gathered in Footnote 2, not all of the prosecutors appeared to be upright gentlemen, and some courts sanctioned highly unethical behavior under varied guises of elastic judicial rationalization.

3. Cases of more recent origin have more thoughtfully and eruditely examined into the actual act perpetrated by the prosecutor, and even though it was done physically during a trial, such as the offering of false and perjured physical evidence, the prosecutor has not been accorded immunity. The instant case presents such a picture – a prosecutor knowingly using and suffering perjured testimony to occur during a criminal prosecution for first degree murder at which the Death Penalty was sought and was awarded, and was almost carried out on two occasions.

In *Ames v. Vavreck*, 356 F.Supp. 931 (D.C. Minn. 1973) the District Court refused to dismiss a 42 U.S.C. 1983 suit against State Prosecuting Attorney Vavreck where the complaint alleged that he conspired with police to direct police activity in a warrantless search and seizure and raid on the home of the plaintiff. This clear "police related activity" pierced the "quasi-judicial" immunity enjoyed by the prosecutor.

In *Peterson v. Stanczak*, 48 F.R.D. 426 (1969), the 42 U.S.C. 1983 suit survived dismissal where it was alleged that the prosecutor coerced a plea of guilty and suppressed evidence favorable to the plaintiff, as well as encouraging the mistreatment of the plaintiff in order to induce a confession. 48 F.R.D. 426, 431 (1969) The Court held that "there is no doctrine of absolute immunity for prosecuting attorneys . . ." 48 F.R.D. 426, 432. See also *Littleton v. Berbling*, 468 F.2d 389, 410 (7th Cir. 1972) cert. den. 414 U.S. 1143 (1974).

Additional authority that prosecutors have no immunity in 42 U.S.C. 1983 suits when they are doing something other than

Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972) draws the line on where prosecutorial immunity granted to prosecutors must end, where the act assailed is not discretionary, is not done in good faith, and is an act in fact actually prohibited by all Canons of Ethics and all decisions of this Honorable Court.

The Sixth Circuit said, regarding the wilful falsification of key and critical blood evidence in a homicide case:

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quasi-judicial tasks is provided by *Hampton v. Chicago*, 484 F.2d 602 (7th Cir. 1973) (A prosecutor who either plans or participates in an illegal raid upon a person's home is liable under the act.) See *"Federal Civil Rights Acts – Civil Practice"* by Professor C.J. Antieau (1974 Supplement, Section 40, Page 72, Note 31 for a compilation of late authorities. Lawyers co-operative Publishing Company, Rochester, New York 14603; Bancroft-Whitney Company, San Francisco, California 94107.)

[2]Cases unholding the immunity accorded to prosecutors under 42 U.S.C. 1983 suits are many. *Barnes v. Dorsey*, 480 F. 2d 1057, 1060 (8th Cir. 1973)) (prosecutor held to be acting within scope of duty as prosecutor doing acts properly categorized as prosecutorial rather than investigatory; thus, he was cloaked with same immunity as judge; opinion devoid, however, of concrete allegations of prosecutorial misbehavior to enable independent analysis of its correctness); *Wilhelm v. Turner*, 431 F.2d 177, 180 - 183 (8th Cir. 1970) (Iowa Attorney General had "probable cause" and "acted in good faith" in seizing allegedly obscene newspaper on Grinnell College campus; even though role was arguably "investigatory" rather than "prosecutorial," the investigatory defense of "good faith" established immunity under 42 U.S.C. 1983 suit against Iowa Attorney General). *Fanale v. Sheehy*, 385 F.2d 866, 868 - 869 (2d Cir. 1967) (Complaint against prosecutor vague but Second Circuit opinion apparently makes it clear that sole prosecutorial act assailed was the discretionary act whether to prosecute or not; but see concurring opinion of Feinberg, C.J. 385 F.2d 866, 869); *Rhodes v. Meyer*, 334 F.2d 709, 717 - 718 (8th Cir. 1964) (prosecuting attorney held immune for performance of *official* tasks in connection with

"The Code of Professional Responsibility adopted by the American Bar Association contains the following provisions with respect to the duties of a public prosecutor:

"EC 7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our

prosecution of 42 U.S.C. 1983 plaintiff for contempt); *Hurlburt v. Graham*, 323 F.2d 723, 725 (6th Cir. 1963) (prosecutor given immunity in 42 U.S.C. 1983 suit brought by plaintiff he had prosecuted in a reckless driving case; no concrete allegations of prosecutorial misconduct, prosecutor appeared to be acting fully within proper areas of legitimate use of his office.) *Phillips v. Nash*, 311 F.2d 513, 516 (7th Cir. 1962) (prosecutor could not be sued in 42 U.S.C. 1983 suit for alleged failure to afford plaintiff a speedy trial of criminal charges); *Madison v. Gerstein*, 440 F.2d 338 (5th Cir. 1971) (42 U.S.C. 1983 immunity for assistant state attorney sued for common law malicious prosecution and false arrest; the original criminal case against the plaintiffs had been dismissed for want of prosecution). See also *Madison v. Purdy*, 410 F.2d 99 (5th Cir. 1969) for an earlier opinion in a prior appeal of this case. See also *Guedry v. Ford*, 431 F.2d 660 (5th Cir. 1970) (42 U.S.C. 1983 suit against, inter alia, a prosecutor and judge dismissed for quasi-judicial immunity provided that the acts are within the scope of his jurisdiction and *are authorized by law.*) See also *Peek v. Mitchell*, 419 F.2d 575 (6th Cir. 1970); *Carmack v. Gibson*, 363 F.2d 862 (5th Cir. 1966); *Friedman v. Younger*, 282 F. Supp. 710 (C.D. Calif. 1968). *Brown v. Joseph*, 463 F.2d 1046, 1048 (3rd Cir. 1972) (Third circuit, without extensive analysis of the factual basis for

system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the [sic] to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused.'

'DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer

'(A) A public prosecutor or other government lawyer shall not institute or cause to [sic] instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

the 42 U.S.C. 1983 complaint, reasserted previous decisions of that circuit, granting immunity to state prosecutors "unless their acts are clearly outside the scope of their jurisdiction." *Bauers v. Heisel*, 361 F.2d 581 (3rd Cir. 1966); *Kauffman v. Moss*, 420 F.2d 1270 (3rd Cir. 1970) (suit against a public defender who plead his client guilty and failed to take appeal; state post-conviction remedies proved unsuccessful and 42 U.S.C. 1983 suit followed.)

Arensman v. Brown, 430 F.2d 190, 192 - 194 (7th Cir. 1970) (State Prosecutor immune where his only acts were the good-faith *discretionary* act of filing criminal charges in assault and resisting arrest case arising out of lawful attempt to arrest plaintiff for a contempt arising out of a failure to provide marital support order; prosecutor is to be "immune from liability in the discharge of his *official* duties." 430 F.2d 190, 193; the Seventh Circuit adopted language from *Bauers v. Heisel*, 361 F.2d 581, 590 (3rd Cir. en banc 1966), giving "quasi-judicial" immunity to a prosecutor "... because his office is vested with a vast quantum of *discretion* which is necessary for the vindication of

'(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.'

[5] We hold that factual averments of the complaint as summarized above, considered in a light most favorable to plaintiff, charge the District Attorney General with acts which were outside his quasi-judicial capacity and beyond the scope of 'duties constituting an integral part of the judicial process.' We are not willing to extend the doctrine of quasi-judicial immunity to a complaint charging deliberate suppression of an FBI laboratory report establishing the innocence of the defendant."

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the public interest. In this respect, it is imperative that he enjoy the same freedom and independence of action as that which is accorded members of the bench. . ."). *Bauers v. Heisel,* 361 F.2d 581, 589 (3rd Cir. 1966 en banc) (Prosecutor immune from 42 U.S.C. 1983 lawsuit brought by juvenile who asserted that prosecutor wrongly prosecuted him in adult court when only proper forum was a juvenile court; but see Hastie, C.J., concurring in result, 361 F.2d 581, 592, and Biggs, C.J. and Freedman, C.J., in separate dissents; Judge Hastie said: ". . . I do not share the view of the majority that the doctrine of "judicial immunity" protects whatever acts of a public prosecutor are "done in his official capacity" or are not "clearly outside his jurisdiction." Judge Freedman said: "I would not equate the trial conduct of a prosecutor with the adjudicatory role of a judge, whose duties involve a process so delicate that it would be undesirable to subject him to inquiry by suit under the Civil Rights Act. An advocate stands in a totally different position and I do not believe that the state's advocate should be any more immune than the defendant's advocate, who is licensed by the State, or its police officers. I, therefore, dissent from the view

In *McCray v. State of Maryland,* 456 F.2d 1, 3 (4th Cir. 1972) the Court said:

> "The immunity of quasi-judicial officers such as prosecuting attorneys and parole board members derives, not from their formal association with the judicial process, but from the fact that they *exercise a discretion* similar to that exercised by judges. Like judges, they require the insulation of absolute immunity to assure the courageous exercise of their discretionary duties. *Where an official is not called upon to exercise judicial or quasi-judicial discretion,* courts have properly refused to extend to him the protection of absolute judicial immunity, regardless of any apparent relationship of his role in the judicial system."

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that a prosecutor is in all cases immune from liability under the Civil Rights Act." (361 F.2d 581, 594).

Sires v. Cole, 320 F.2d 877 (9th Cir. 1963) (In a 42 U.S.C. 1983 suit, plaintiff sued a judge and a prosecutor for wrongly sentencing him, and participating in sentencing him for a felony when in reality his calf-stealing crime was a misdemeanor; in dismissing,. the Ninth Circuit merely stated "a prosecuting attorney is a quasi-judicial officer and enjoys the same immunity from a Civil action for damages as that which protects a judge." 320 F.2d at 879 - 880.)

Harmon v. Superior Court, 329 F.2d 154 (9th Cir. 1964) (In this action under 42 U.S.C. 1983, a disappointed domestic relations litigant's suit against, inter alia, a prosecutor was dismissed because the acts complained of were "quasi-judicial acts" done by them in the exercise of their "quasi-judicial functions," and thus they were to be accorded immunity.)

Agnew v. Moody, 330 F.2d 868, (9th Cir. 1964) (Dismissal of 42 U.S.C. 1983 suit against a city attorney who had prosecuted the plaintiff for a minor traffic ticket under the quasi-judicial immunity doctrine). The foregoing three Ninth Circuit cases regretfully present little solid, honest, salient district attorney violations, and the three plaintiffs, unlike *Paul Kern Imbler,* were charged respectively, with calf-stealing, failure to support minor

In *Lewis v. Brautigam*, 227 F.2d 124, 129 (5th Cir. 1955) the Court said:

> "[A] quasi-judicial officer, such as a prosecuting attorney, *who acts outside the scope of his jurisdiction and without authorization of law*, cannot shelter himself from liability by the plea that he is acting under color of office."

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children, and minor traffic violations. The Ninth Circuit uses all three in support of an automatic dismissal of Imbler's serious Civil Rights complaint. (Appendix, Page 117). As an example of a more substantial deprivation of Due Process, in *Ney v. State of California*, 439 F.2d 1285 (9th Cir. 1971), a 42 U.S.C. 1983 dismissal was approved by the Ninth Circuit in spite of allegations of knowingly altered electronic tapes being used in a criminal proceeding by a prosecutor. See also *Clark v. Washington*, 366 F.2d 678 (9th Cir. 1966) (A prosecutor is to be accorded immunity if his acts were commited in the performance of an integral part of the judicial *process;* the Ninth Circuit, in affirming Imbler's dismissal, sanctioned the *perjury* because it occurred as an integral part of the judicial process); *Marlowe v. Coakley*, 404 F.2d 70 (9th Cir. 1968) (Dismissal of 42 U.S.C. 1983 suit affirmed where allegation was that prosecutor knowingly and wilfully, or with gross negligence, presented perjured testimony to the grand jury investigating the plaintiff's activities; in spite of whether it was perjured or not, "a California District Attorney's presentation of evidence to a grand jury is clearly within the scope of his duty to advise and present information to the grand jury as authorized by California law. . ."). The doctrine of prosecutorial immunity is at least 50 years old. *Yaselli v. Goff*, 12 F.2d 396, 56 A.L.R. 1239 (2d Cir. 1926) (*Yaselli* was one of the early Federal cases according immunity to the United States Attorney: "A United States Attorney, if not a judicial officer, is at least a quasi-judicial officer, of the government. He exercises important judicial functions, and is engaged in the enforcement of the law. The reasons for granting immunity to judges, jurors, attorneys, and executive officers of the government apply to a public prosecutor in the performance of the duties which rest upon him. To hold that an attorney of a private client is clothed with absolute privilege and that a public prosecutor, whose duty it is to

The foregoing non-discretional act of the prosecutor, clearly done in the absence of good faith, and clearly an act prohibited by decisions of this Court, clearly thus give rise to a valid 42 U.S.C. 1983 Federal Civil Rights suit. *Mooney v. Holohan*, 294 U.S. 103; *Pyle v. Kansas*, 317 U.S. 213, *Alcorta v. Texas*, 355 U.S. 28; *Hysler v. Florida*, 315 U.S. 411; *Miller v. Pate*, 386 U.S. 1; *Giglio v. United States*, 405 U.S. 150; *DeMarco v. United States*, 415 U.S. 449; *Napue v. Illinois*, 360 U.S. 264; *Imbler v. Craven*, 298 F. Supp. 795 (C.D. Calif. 1969).

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enforce the laws of the United States, is not exempt because of what he says and does in the discharge of the duties of his office, is so unreasonable, so contrary to sound public policy, and to the fundamental principles of our jurisprudence that we cannot accept it."; 12 F.2d at 404). *Kenney v. Fox*, 232 F.2d 288, 290 (6th Cir. 1956) ("A prosecuting attorney is a quasi-judicial officer and enjoys the same immunity from a civil action for damages as that which protects a judge acting within his jurisdiction over the parties and the subject matter of the litigation;" *Stift v. Lynch*, 267 F.2d 237 (7th Cir. 1959) (Illinois prosecutors given 42 U.S.C. 1981 - 1983 immunity even though it appeared true that they sought and obtained a $1,000 bail for an offense charged against plaintiffs where maximum punishment, even if conviction would eventually result, was a $200 fine; the Seventh Circuit, conceding the conduct "reprehensible," nonetheless found that the great weight of authority was against liability of the prosecutor; 267 F.2d 237, 239); *Peckham v. Scanlon*, et al., 241 F.2d 761, 763 (Illinois prosecutors given 42 U.S.C. 1983 - 1985 immunity against allegations that they resisted inmate-plaintiff in securing a transcript for post-conviction relief of his trial in which he suffered a criminal conviction, and urging dismissal of the case because of the absence of said transcript. The Seventh Circuit said "the allegations of the complaint leave no doubt but that any and all acts charged against the Judge and the Assistant State's Attorney were performed in the discharge of their *official* duties . . . such officials are immune to prosecution of a suit of

Cases following *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972) have recognized the difference between *discretional* and *non-discretional* acts of the prosecutor.[3]

In general it can be seen from a close perusal of the majority of the foregoing cases that upheld the immunity to the prosecutor, that the acts of the prosecutor were:

(1) acts done *in good faith;*

(2) *discretional acts* done in the day-to-day decision making process;

(3) done within the scope of the *legitimate* prosecutorial function.

We submit, that, quite to the contrary, *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974) presents a case of a prosecutor wilfully, premeditatively and maliciously using perjured testimony to achieve a

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the instant character. . ."); *Jennings v. Nester*, 217 F.2d 153, 155 (7th Cir. 1954) (State's Attorneys when acting in their official capacities are protected by the same immunity in civil cases that is applicable to judges; prosecutors appeared to act solely in normal prosecutorial role in convicting plaintiff, who was still an Illinois inmate, of a felony; the opinion is devoid of concrete facts upon which to evaluate its result.)

Crawley v. Warren, 216 F.2d 74, 75 - 76 (7th Cir. 1954) (42 U.S.C. 1983 - 1985 suit dismissed in spite of allegation that defendant prosecutor *conspired* to procure grand jury indictments wilfully and wantonly, without use of either competent witnesses or competent evidence; the Seventh Circuit simply enunciated an apparent Carte Blanche immunity to Illinois prosecutors equivalent to that enjoyed by the judiciary, holding that ". . . as a matter of public policy, such an injured person is without relief in a Civil proceeding. . .") (216 F.2d 74, 77).

Some of the older cases push the limits of intellectual reasoning on the immunity concept to the absurd: ***Laughlin v.***

criminal conviction for murder, much as *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972).

We assert that the use of perjured testimony by a state or federal prosecutor in a state or federal criminal proceeding is clearly *not a good-faith act of discretion*, and one therefore that is forbidden by the decisions of all of the major courts and jurisdictions that have considered it. Further, it is not within the *legitimate* prosecutorial function. (Kilkenny, C.J., dissenting in *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974) [Appendix, Page 116-125]). *Hilliard v. Williams*, 465 F.2d 1212, 1217-1218 (6th Cir. 1972).

Rosenman, 82 U.S. App. D.C. 164, 163 F.2d 838 (D.C. Cir. 1947) (This amazing decision found no liability in a complaint which alleged that the prosecutor, from ulterior motives, knowingly and wilfully concocted false testimony against the plaintiff; essentially the decision sanctions even the knowing use of perjury as long as it was done within the normal prosecutorial function, citing *Cooper v. O'Connor*, infra); In *Cooper v. O'Connor*, 69 App. D.C. 100, 99 F.2d 135, 118 A.L.R. 1440 (D.C. Cir. 1938), general immunity was accorded if the acts charged came within the scope of the prosecutor's official duty, in spite of an allegation in the complaint that the acts were done maliciously and without probable cause; the reason for the rule was "simply one of public policy." 99 F.2d 135, 141. *Mitchell v. Greenough*, 100 F.2d 184, 186 - 187 (9th Cir. 1938), contains the frightening analysis that even if a prosecutor perpetrates false testimony in a ciminal case, the victim defendant is not denied "equal protection of the law" because the same aberrant prosecutor has the same illegal chance as all other defendants unfortunate enough to come into his clutches!!! At 100 F.2d 184, 186 - 187 we find the following fantastic intellectual non-sequiturs:

> ". . . Appellant was subjected to no greater hazard that any other individual in the state, namely, the hazard of being prosecuted for a crime and convicted by false testimony, and if the prosecuting officer of the county were sufficiently corrupt to use his high office for the

We assert that no thinking Court would grant prosecutorial immunity under 42 U.S.C. 1983 to such forbidden behavior. It is clear that the instant district attorney respondent *knew*, or in the exercise of simple contemplation *should have known* of the illegality of his unprofessional acts and as such he should not be shielded by this sort of case-created, judicially decreed "quasi-judicial" immunity.

We assert that this case against the respondent district attorney should not have been dismissed on the pleadings before trial on the merits by United States District Judge Robert J. Kelleher of the Central District

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purpose of convicting innocent people by perjured testimony, *all* of the citizens within his jurisdiction would be subject to the same hazard . . ."

In *Mitchell v. Greenough*, supra, the Civil Rights plaintiff based his cause of action, much as in the case now at bar, on allegations of the knowing use of perjured testimony within the meaning of *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791; 100 F.2d at 185 - 186.)

[3] *John v. Hurt*, 489 F.2d 786 (7th Cir. 1973), while noting the existence of *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972), found that a public defender enjoyed *qualified* immunity against a 42 U.S.C. 1983 suit where the complaint, even when construed broadly, failed to indicate that the acts complained of fell beyond the scope of the normal prosecutorial function. "In deciding whether to object to evidence, whether to call a particular witness, and how to address the jury, the public defender was performing acts within the scope of his employment. Although it may be established under the pleadings that defendant made gross errors of judgment, we note that there is no allegation that his conduct was *intentionally* harmful to plaintiff, or otherwise *deliberately* inconsistent with his obligations to plaintiff so as to be a *voluntary* excursion outside the scope of his duties. . ." The major Sixth Circuit decision in *Hilliard v. Williams* has been cited with approval in several lower Federal Courts. In *Haaf v. Grimes*, 355 F. Supp. 542, 545 (D.C.

of California, and the United States Court of Appeals for the Ninth Circuit writing in *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974) should be reversed.

The prosecutorial immunity under 42 U.S.C. 1983 and the cases so establishing it should be disapproved, where the complaint clearly alleges deprivations of Due Process of Law in a factual non-conclusionary manner.

II.

WHERE THERE HAS BEEN A PRIOR JUDICIAL DECISION AFFIXING THE ACTS OF THE DISTRICT ATTORNEY AS BEING A DEPRIVATION OF DUE PROCESS OF LAW, THE PROSECUTOR CAN NOT CONTEND THAT HE IS BEING REQUIRED TO APPEAR IN AND DEFEND A FRIVOLOUS LAWSUIT. *IMBLER V. CRAVEN*, 298 F.Supp. 795; *GREGOIRE V. BIDDLE*, 177 F.2d 579 (2d Cir. 1949); *HILLIARD V. WILLIAMS*, 465 F.2d 1212 (6th Cir. 1972).

We have elsewhere set forth in this brief some of the oft-quoted reasons for granting a prosecutor immunity

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Minn. 1973), the Court denied dismissal of a 42 U.S.C. 1983 suit against a prosecutor who allegedly withheld exculpatory evidence favorable to the plaintiff; held, a prosecutor who withholds evidence is liable under Section 1983 per *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972).

In *Ames v. Vavreck*, 356 F.Supp. 931 (D.C. Minn. 1973), the District Court refused to dismiss a 42 U.S.C. 1983 suit against prosecutor *Vavreck* where it was alleged that he conspired with police to direct police activity in a warrantless search and seizure and raid on the home of the plaintiff.

from suit under 42 U.S.C. 1983; among those reasons was a desire to insulate the prosecutor from diluting his time to defend unsubstantial, spurious, ill-founded lawsuits. Indeed, that great legal scholar, the late Honorable Learned Hand of the Second Circuit in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949) *embraced* the suit against the prosecutor if it were only possible to discern the good from the bad suits before actual trial. Under the facts of the instant case (See Appendix, Pages 30-60) the prosecutor has admitted to many of the facts that are here contended to be denials of due process to Imbler. Thus, while not a named respondent and participant in the 28 U.S.C. 2254 proceedings ending in *Imbler v. Craven*, 298 F. Supp. 795 (C.D. Calif. 1969), the Respondent District Attorney was sufficiently implicated by his own statements at the evidentiary hearing ordered by the State Supreme Court of California that he can not now contend that he should not be required to defend an insubstantial lawsuit. Thus, we assert to here come as close as possible to the ideal desires of the great late Honorable Learned Hand in *Gregoire v. Biddle*, 177 F.2d 579, ____ (2d Cir. 1949), where he said:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The jurisdiction for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to inevitable danger of its outcome,

> would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books." Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949).

See Page 119, Appendix, where the foregoing quotation is seemingly relied upon by the Ninth Circuit 2 - 1 majority to affirm the dismissal on the pleadings; that analysis conveniently omits the very fact that the successful petition for relief under 28 U.S.C. 2254, *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969) constituted the "preliminary hearing" for prosecutor Pachtman and he can not now be heard to complain that he is being required to defend an ill-founded cause of action.

We assert at the very minimum that this Honorable Court must sanction a 42 U.S.C. 1983 Civil Rights suit against a prosecutor whenever that suit has been preceded by the grant of a Writ of Habeas Corpus by an opinion finding true the allegations of denial of Due Process upon which the 42 U.S.C. 1983 lawsuit is based.

Indeed, it must be remembered that lawsuits such as those sanctioned in *Robichaud v. Ronan*, 351 F.2d 533 (9th Cir. 1965), *Lewis v. Brautigam*, 227 F.2d 124 (5th Cir. 1955), may at trial prove to be based on fully false, non-sustainable allegations and thus the prosecutor has been put to his defense by the spurious allegations that he was acting like a policeman. Very few actions under 42 U.S.C. 1983 that we are aware of have been preceded by a successful Federal 28 U.S.C. 2254 Writ of Habeas Corpus; we assert that this precedent to the lawsuit is sufficient foundation to at least open the door to a valid cause of action against the prosecutor. In particular, the decision *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969) then provides full and cogent basis for the Federal Civil Rights Suit; surely it creates a more solid foundation for the suit than the mere allegations contained in the pleadings of such cases as *Robichaud v. Ronan*, supra. Hence, at the very minimum, we contend and argue that, under the facts of this case, where 42 U.S.C. 1983 suit was preceded by the favorable act of granting of Federal Habeas Corpus under 28 U.S.C. 2254 in a well-reasoned, detailed opinion by a distinguished Federal Judge, that 42 U.S.C. 1983 suit can not be dismissed on the pleadings for failure to state a cause of action. Under at least these circumstances, prosecutorial liability should be clearly and logically allowed.

III.

UNDER THE LAW ENUNCIATED FROM MANY OF THE UNITED STATES CIRCUIT COURTS, SOME OF THE ACTS OF RE-

SPONDENT PROSECUTOR PACHTMAN WERE NOT WITHIN THE NORMAL ROLE OF A PROSECUTOR AND ARE NOT PROTECTED IN ANY EVENT.

In general, directing the activities of police and police officers in the decision to arrest or refrain from arresting a suspect of a crime is a police function. With full knowledge that Los Angeles Police Officers were at the courtroom to arrest Alfred John Costello for "bad check charges," Respondent Prosecutor Pachtman directed and requested that the arrest not be effected until he, Pachtman, had concluded his use of Costello as the key witness against Imbler. (Appendix Pages 41 - 42). At this time, the respondent had knowledge that Costello had recently written bad checks for relatively small amounts of which some were still outstanding and one of which was the basis of a pending criminal proceeding. (Appendix, Page 41). Nonetheless, Prosecutor Pachtman elicited from Costello the false evidence that he had averaged "$9,000 - $10,000 per year in earnings for the past four years" as an engineer for the Los Angeles based Carnation Dairies. In fact, as set forth in the opinion, *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969, Appendix 30 through 60), Costello had never attended any college, was not an engineer, and was certainly not an engineer with Carnation Dairies earning in excess of $9,000 per year for the last four years. In fact, Costello was either in an insane asylum or in the California State Prison at San Quentin during this key period when he claimed to have achieved the two degrees in Industrial Relations and Engineering. These two degrees would have normally required seven to eight years of effort, taking into account some credit overlap between the two distinctly

different fields purportedly followed by Costello at the two different institutions. In fact, Costello was more or less an itinerant bum, living by his wits in one forgery after another, and had a lengthy arrest history for that activity as revealed by his F.B.I. - C.I.I. "make sheet" in the possession of Respondent Pachtman.

The decision to arrest and the directive or request to refrain from arresting are integral parts of the police function, and if the District Attorney engages in these functions he can not expect to receive "quasi-judicial" immunity. *Balistrieri v. Warren*, 314 F.Supp. 824 (W.D. Wis. 1970) (Prosecutor and police entered liquor bar, interfered with business, etc.); *Robichaud v. Ronan*, 351 F.2d 533 (9th Cir. 1965) (Prosecutor directed police in wide variety of activities normally a police function); *Lewis v. Brautigam*, 227 F.2d 124, 55 A.L.R. 2d 505 (5th Cir. 1955) (Prosecutor attempted to coerce guilty plea, directed removal of defendant to a prison 300 miles from trial situs to interfere with preparation of the defense of the case.); *Corsican Productions v. Pitchess*, 338 F.2d 441 (9th Cir. 1964); *Donovan v. Reinbold*, 443 F.2d 738 (9th Cir. 1970); *Ames v. Vavreck*, 356 F.Supp. 931 (D.C. Minn. 1973) (Prosecutor directed warrantless search and seizure and raid on plaintiff's home); *Peterson v. Stanczak*, 48 F.R.D. 426 (1969) (coerced plea of guilty, suppression of evidence); *Littleton v. Berbling*, 468 F.2d 389 (7th Cir. 1972); *Hampton v. Chicago*, 484 F.2d 602 (7th Cir. 1973) (illegal raids participated in by prosecutor on homes of the Black Panthers, etc.).

While our main thrust for advocating this lawsuit to lie under 42 U.S.C. 1983 against this prosecutor is other than that he acted as a policeman, we are still constrained to point out the obvious police role that

Prosecutor Pachtman occupied in directing police officers in an arrest – non-arrest scenario. As such, immunity must be declined to him.

IV.

THE PROSECUTOR IS AN ARM OF THE EXECUTIVE BRANCH OF GOVERNMENT, AND AS SUCH SHOULD ENJOY NO "QUASI-JUDICIAL" IMMUNITY WITHIN THE MEANING OF THE RECENT DECISION OF THIS HONORABLE COURT IN *SCHEUER V. RHODES*, 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974).

We perceive that one of the threshold issues that should be decided and resolved by this Honorable Court is the oft-quoted rationalization that the nation's prosecutors enjoy "quasi-judicial" immunity. This means that they occupy that exalted role assumed by judges; judges having been granted immunity in general, so should the prosecutor, according to this rationale.

Why their immunity, if any, should stem from some "judicial" immunity defies logic, since they are clearly an arm of the executive branch in both Federal and State Government. The Attorney General of the United States is a non-elected cabinet position holding his position at the pleasure of the Chief Executive; the Attorney General chooses his top-level assistants; the various United States Attorneys are nominated by the *President* with the advice and consent of the Senate and are usually out of their jobs with a change in administration. In California, the office of the District Attorney is the Chief law enforcement office of the

County and represents the People before purportedly neutral judges in an adversary manner. Being merely one of the two advocates appearing in an adversary setting before a presumably non-interested judge, it is difficult to logically ascertain why one of these advocates should enjoy some sort of immunity that he supposedly "derives" from the judge before whom he is appearing. In *Scheuer v. Rhodes*, 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683 (4-17-74), this Honorable Court unanimously pierced the so-called executive immunity veil. See also 471 F.2d 430, reversed. Not only is this decision important for establishing at least qualified executive liability, but it is instructive in other areas of importance to the case sub-judice. The *Scheuer v. Rhodes* complaint alleged, inter alia, that the defendants acted either outside the scope of their respective office, or, if within the scope, acted in an arbitrary manner, grossly abusing the *lawful* powers of office. (40 L.Ed.2d at 96). This Court noted that the issue, in deciding to dismiss, was not whether the plaintiff could ultimately prevail or not but whether the claimant is entitled to offer evidence to support the claims. (40 L.Ed.2d at 96). The allegations of the complaint should be construed favorably to the pleader.

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957). Cited with approval in *Scheuer v. Rhodes*, 416 U.S. 232, 40 L.Ed.2d 90, 96 - 97, 94 S.Ct. 1683 (1974).

The District Attorney is here a state official, a representative of the State of California, an arm of the executive branch of government. Since *Ex Parte Young*, 209 U.S. 123, 52 L.Ed. 714, 28 S.Ct. 441 (1907), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he has deprived another of a federal right under the color of state law. *Ex Parte Young* teaches that when a state officer acts under a state law in a manner violative of the Federal Constitutions, he

> "comes into conflict with the superior authority of that Constitution and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the Supreme Authority of the United States." 209 U.S. at 159 - 160, 52 L.Ed. 714. Cited 40 L.Ed.2d 90, 97.

Where, as here, the District Attorney is asserted to have violated Federally-protected rights, it is clear that so-called "quasi-judicial" immunity places one executive branch employee above the mandates of the Federal Constitution and Federal Statutes such as 42 U.S.C. 1983 which on their face provide no such immunity.

So much was recognized by Ninth Circuit Judge John F. Kilkenny in dissent in *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974); see Apendix, pages 121 - 122. Judge Kilkenny noted that "otherwise, the office of the District Attorney, rather than the Constitution of the United States, becomes the Supreme Law of the Land." (Appendix, Page 122.)

> "When there is a substantial showing that the exertion of state power has overridden private rights secured by (the) Constitution, the subject is

necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals *charged with* the transgression." *Sterling v. Constantin*, 287 U.S. 378, 398, 53 S.Ct. 190, 195, 77 L.Ed. 375 (1932) Single Appendix, Page 122.

While Chief Justice Burger enunciated in *Scheuer v. Rhodes*, supra, his views that the suit should not be barred under asserted Eleventh Amendment auspices, it is clear that the reasoning is appropos of the instant case because of the true *executive branch* role occupied by the Prosecutor Pachtman. The so-called "quasi-judicial" immunity is really thus not an appropriate phrase to affix to the executive-branch prosecutor.

Proceeding on to the issue of whether an "absolute executive immunity" existed, Chief Justice Burger speaking for this unanimous Honorable Court noted that really it was not an absolute, but a *qualified* immunity. (40 L.Ed.2d 90, 98 - 99).

"This absolute immunity apparently rested, in its genesis, on two mutually dependent rationales:

(1) the injustice *particulary in the absence of bad faith* of subjecting to liability an officer who is *required*, by the *legal obligations of his position*, to *exercise discretion;*

(2) the danger that the treat [sic] of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." (40 L.Ed.2d 90, 99)

We note, in passing, the significance of the foregoing duality to the case at bar:

(a) Bad faith is clearly demonstrated and is present in the knowing use of perjury to achieve a state criminal conviction.

(b) There is no exercise of an act of *discretion*, and a *decision of discretion* is not involved in the matter of the use of perjury by a prosecutor; he is absolutely forbidden to use it. *Mooney v. Holohan*, 394 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 794 (1935). *Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967); *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *Alcorta v. Texas*, 355 U.S. 38, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); *Hysler v. Florida*, 315 U.S. 411, 62 S.Ct. 688, 86 L. Ed. 932 (1942); *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942); *Evans v. Eyman*, 363 F.2d 540, 542 (9th Cir. 1966), *Miller v. Pate*, 381 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 692; *Imbler v. Craven*, 298 F. Supp. 795 (C.D. Calif. 1969); *In re Ferguson*, 5 Cal. 3rd 525; *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104; *De Marco v. United States*, 415 U.S. 449, 94 S.Ct. 1185, 39 L.Ed.2d 501; *United States v. Ted Dean Butler*, ____ F.2d ____ (9th Cir. 1974).

(c) There is no requirement, by the legal obligations of either the *office* or the *oath* of the District Attorney to use perjury, and indeed the same is forbidden by the office, the oath, the Constitution, and the decisions of this Honorable Court, the Highest Court of California, and the Federal Ninth Circuit governing the State of California and the Central District of California.

(d) the "public good" can hardly require that the prosecutor use perjury, and hence he need not fear a lawsuit because he "would be deterred" to "willingly execute his office with the decisiveness and the judgment required by the public good." (40 L.Ed.2d 90, 99).

In short, the avowed reasons for so-called official executive immunity can not be appropos of the forbidden acts of this State Prosecutor, an actual arm of the executive branch of government, and he should receive no more immunity than that immunity denied the executive branch in *Scheuer v. Rhodes*, 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974).

Chief Justice Burger, at 40 L.Ed.2d 90, 100, noted that

> "It can hardly be argued at this late date, that under no circumstances can the officers of state government be subject to liability under this statute. . ."

42 U.S.C. 1983 was meant

> "to give a remedy to parties deprived of Constitutional rights, privileges and immunities by an official's *abuse* of position." Thru the Civil Rights statutes, Congress intended to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. (40 L.Ed.2d 90, 100).

Under the instant allegations, much like those set forth in *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972), it can not honestly be asserted that the knowing use of perjured testimony is a good-faith act of discretion, wherein honest "error" may sometimes arise, within the *legitimate* prosecutorial function, so as to insulate the act of the aberrant prosecutor from liability under 42 U.S.C. 1983. This conclusion follows from either an "executive" or "judicial" vantage point, whatever may be the contention as to the position occupied by the nation's prosecutors.

It must be clear that the defense of "good faith," and "probable cause" ala police officer suits under 42 U.S.C. 1983 is simply not here either in issue or appropriate. *Pierson v. Ray*, 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967); (40 L.Ed.2d 90, 101, 102).

Unlike *Scheuer v. Rhodes*, supra, where this Court noted the possibility that swift decision making may be necessary to quell civil disorders, (40 L.Ed.2d 90, 102), there is no concomitant rapid necessity to act in the area of deciding whether or not to use perjured testimony. That decision is fully removed from the quandry a prosecutor may otherwise find himself in in his day-to-day professional life.

We need not further reiterate the analysis of *Scheuer v. Rhodes*, a unanimous decision of this Honorable Court. We do note in passing that this Court enunciated a direct linear relationship between the scope of permissible decision making, honest error and the scope of area of decisions that had to be made. This means the scope of error allowed the police on arrest in good faith might well be smaller than that scope allowed the Governor of Ohio and his Adjutant General in calling out the Ohio National Guard to quell an uprising, where rapid decision making appears necessary to preserve the peace.

But we also return to our undeviating thesis: There is neither a quick nor contemplative decision-making process in the area of the life of the prosecutor where he faces the "choice" of whether to use or not use perjury, or to correct the same when it occurs; that "choice" is removed from him as surely as the taking of the forbidden fruit in the Garden of Eden by Eve. District Attorney Pachtman, respondent herein, just as did Eve, and eventually Adam, willingly and with

malice aforethough, went ahead and failed to correct testimony he knew to be wilfully false. That is not a good-faith act of honest error, and these issues have been adjudicated already in *Imbler v. Craven*, 298 F. Supp. 795 (C.D. Calif. 1969).

Paraphrasing from *Scheuer v. Rhodes*, 40 L.Ed.2d 90, 103,

> "Under the criteria developed by precedents of this Court, Sec. 1983 would be drained of meaning were we to hold that the acts of a (district attorney) has the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government . . ." ". . . If this extreme position could be deemed to be well taken, it is manifest that the feat of a (district attorney), and not the Constitution of the United States, would be the Supreme Law of the Land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers . . . to the (prosecutor) to be exercised by him, beyond control, upon his (subjective) assertion of necessity . . . When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression."

Scheuer v. Rhodes, 416 U.S. 232, 40 L.Ed.2d 90, 103 - 104.

Thus, it is evident that the suit against the instant prosecutor is not one subject to dismissal on the pleadings under several theories:

(1) In fact the prosecutor is as much a member of the executive branch and team as is the Governor.

(2) In the case at bar, he violated Constitutional rights guaranteed this petitioner by performing the non-discretional, non-good faith act of using perjured testimony in a state criminal proceedings, an act forbidden by all known judicial decisions.

(3) From its very nature, "good-faith error" can not be a defense under the asserted facts of this case.

(4) No duty of his office required rapid decision in an esoteric area where he rightly might be absolved of honest error of judgment and use of discretion.

(5) His act was not required by the "public good," and the judgment preceding that act was one forbidden to him to make or use discretion thereon.

We suggest that this Court must come to grips with the fundamental issue of whether a *prosecutor*, a member of the *executive branch*, should derive any pseudo-immunity stemming from the immunity accorded to the judiciary. We assert that *Scheuer v. Rhodes*, supra, commands that he should not, and "quasi-judicial" immunity is really here highly misplaced. It is an intellectual non-sequitur, and a concept that must be reanalyzed in light of the well-thought reasoning of *Scheuer v. Rhodes*.

V.

THIS HONORABLE COURT HAS RECENTLY GREATLY REVISED AND INCREASED THE SCOPE OF THE CAUSE OF ACTION UNDER 42 U.S.C. 1983 LAWSUITS BY PROVIDING FOR A CAUSE OF ACTION FOR COMMON LAW NEGLIGENCE, WHEN THE PERPETRATOR KNEW, OR REASONABLY SHOULD HAVE KNOWN THAT HIS ACT(S) WOULD CAUSE A DEPRIVATION OF CIVIL RIGHTS TO HIS VICTIM. *WOOD V. STRICKLAND*, ____ U.S. ____, 43 L.Ed.2d 214, 95 S.Ct. 992 (1975).

This Honorable Court has previously extended immunity on both unrestricted and restricted basis to recognized government groups. In *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951) the members of the legislature were granted full immunity from Civil Liability for acts *done within the sphere of legislative action*. In *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), the commonlaw doctrine of absolute judicial immunity was found to survive assault under 42 U.S.C. 1983. In the area of the executive branch, however, immunity was not extended to police officers acting outside of a good-faith performance of their duties. *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (19 __). Similarly, the pinnacle of the executive branch, the state governorship, was held reachable in certain circumstances under 42 U.S.C. 1983 only last term, *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). In school administrative areas, clearly an extension of the executive arm, this Court continued to

embrace immunity from tort liability for all *good-faith*, non-malicious actions taken to fulfill official duties. In general, the good-faith performance of an act of *discretion* requiring "prompt action" shall be provided immunity from Civil Rights suits. Nonetheless, it is clear that a cause of action validly plead and validly alleged shall not be dismissed at the pleading stage for failure to state a cause of action. *Wood v. Strickland*, ____ U.S. ____, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).

In general, an important, broad principle can be distilled from the *Wood v. Strickland* analysis:

> Immunity shall not be accorded if the perpetrators *knew* or *reasonably should have known* that the acts under assailment done within the sphere of "official responsibility" would violate the constitutional rights of the victim, *or* if the action was done with a malicious intention to cause a deprivation os [sic] such rights. A monetary sanction can and will be awarded where such acts were carried out with impermissible motivation, *or* with negligent disregard of the victim's rights.

It appears that thus this Honorable Court has enhanced and elevated the requisite standards, to embrace a cause of action under a theory of common law negligence imposing a *standard of care* upon the officials involved. It requires the official involved to be aware of the duties of his station in life. This would require the State Prosecutor *to be aware of*, as in the case sub judice, the leading mandates of this Honorable Court in the range of decisions set forth earlier in this brief commencing with *Mooney v. Holohan*, supra, and including *Napue v. Illinois*, supra.

It would require that state prosecutors not only overtly and knowingly refrain from proscribed *intentional* misbehavior, but would, in addition, impose

a minimal standard of learning and expertise on their functioning.

Such standards are welcome and surely encompass the prosecutor here involved, requiring him to be aware of the guidelines of his profession.

Although we do not feel we have to descend to the standards of common law negligence to state a cause of action, because we have a published decision establishing the *intentional acts*, we welcome the foregoing elevated thinking and advancements in the law of 42 U.S.C. 1983 liability. As recognized in the dissent in *Wood v. Strickland*, supra, *ignorance*, both of the law and requirements of the position held by the defendant, is explicitly equated with "actual malice." 95 S.Ct. at 1004.

It is significant to the case at bar that the *Wood v. Strickland* standards emanated from a factual situation of laymen acting in their "official capacity" as school board members. We suggest that much more cogent reasons then follow for extending the negligence standards to trained lawyers occupying the prosecutorial role who are presumed to be thus familiar with the decided cases and standards in their area of expertise. They, of course, must be charged with the requirements of knowledge of the Canons of Ethics and the Oath of Admission taken when they become members of the Bar. They simply can not escape these fundamental tenents of their role.

We thus urge that the prosecutor here involved, a member of the executive branch of government, shall not escape liability when he either negligently *or* knowingly uses perjury to achieve a criminal conviction. Such is a forbidden act under all recognized decisions of all recognized Courts.

It should be noted that U.S. District Judge Warren J. Ferguson, in granting relief under 28 U.S.C. 2254, recognized a potential basis for relief in the *negligent*, or *reckless* use of false testimony. 298 F.Supp. 795; Single Appendix, Pages 30-60, inclusive. While the District Court did not have to descend to negligence theories, it is clear that an equal deprivation of due process can flow from negligent behavior as from intentional behavior.

We can envision no clearer area of further foundational basis for 42 U.S.C. 1983 liability than extending a cause of action under a theory of negligence to the state prosecutor whose trial tactics are regulated by well-developed constitutional law decisions in the area of use of false testimony. Either the reckless use of false testimony or the knowing use of perjured testimony shall thus support relief under a 42 U.S.C. 1983 suit where, as here, all states impose rigid training and standards on members of the legal profession, and where they must be believed and required to be aware of these standards. *Wood v. Strickland*, ____ U.S. ____, 95 S.Ct. 992, 43 L.Ed.2d 214. (Appendix A-2, this brief.)

CONCLUSION

For each of the foregoing Issues, Questions, Arguments and Points and Authorities, liability against a prosecutor should lie in a 42 U.S.C. 1983 Federal Civil Rights lawsuit, under the circumstances where that prosecutor has wilfully suffered and allowed the knowing use of perjured testimony in a state criminal trial to achieve a criminal conviction; since these acts

are not good-faith, discretional acts within the *legitimate* prosecutorial function, the prosecutor should not enjoy "quasi-judicial" immunity.

At the very minimum, the suit in the instant case should be permitted in view of the grant of a Federal Writ of Habeas Corpus based in part on the same allegations of the instant Civil Rights complaint, said Writ being granted by the Honorable Warren J. Ferguson, United States District Judge, Central District of California under 28 U.S.C. 2254 and the provisions of *Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). *Imbler v. Craven,* 298 F. Supp. 795 (C.D. Calif. 1969), affirmed by the United States Ninth Circuit, *Imbler v. California,* 424 F.2d 631 (9th Cir. 1970), cert. den., 400 U.S. 865, 91 S.Ct. 100, 27 L.Ed.2d 104.

Respectfully submitted,

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APPENDIX A-1

Lilly Mae Onie Lee Whitelaw HILLIARD, Plaintiff-Appellant,

v.

John L. WILLIAMS, Defendant-Appellee.

No. 71-1983.

United States Court of Appeals, Sixth Circuit.

June 28, 1972.

As Amended July 31, 1972.

Certiorari Denied Nov. 20, 1972. See 93 S.Ct. 461.

Damages action brought under the Civil Rights Act against district Attorney General who had prosecuted plaintiff in a criminal proceeding. The United States District Court for the Western District of Tennessee, Eastern Division, Harry W. Wellford, J., sustained a motion to dismiss for failure to state a claim upon which relief could be granted, and plaintiff appealed. The Court of Appeals, Harry Phillips, Chief Judge, held that doctrine of quasi-judicial immunity for a prosecuting attorney would not be extended to a complaint charging that district Attorney General deliberately suppressed at first murder trial of plaintiff, whose initial conviction was reversed and who was then acquitted at second trial, an FBI report establishing the innocence of plaintiff.

Reversed and remanded.

1. Courts ⇐406.5(4)

On appeal from dismissal of a civil rights action, averments of complaint must be treated as true by Court of Appeals and are to be viewed in light most favorable to complainant.

2. Federal Civil Procedure ⇐1773

Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to re-
lief.

3. District and Prosecuting Attorneys
⇐10

A prosecuting attorney, when acting in his official capacity, is immune from suit for damages, provided his acts are within the scope of his jurisdiction and authorized by law.

4. District and Prosecuting Attorneys
⇐10

A quasi-judicial officer, such as a prosecuting attorney, who acts outside the scope of his jurisdiction and without authorization of law cannot shelter himself from liability by the plea that he is acting under color of office.

5. District and Prosecuting Attorneys
⇐10

Doctrine of quasi-judicial immunity for a prosecuting attorney would not be extended to a complaint charging that district Attorney General deliberately suppressed at first murder trial of plaintiff, whose initial conviction was reversed and who was then acquitted at second trial, an FBI report establishing the innocence of plaintiff. 28 U.S.C.A. §§ 1292(b), 1343(3); 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc. rule 12(b)(6), 28 U.S.C.A.

Dwayne D. Maddox Huntington, Tenn., Julian P. Guinn, Paris, Tenn., on brief, for plaintiff-appellant.

Bart Durham, Asst. Atty. Gen., David M. Pack, Atty. Gen., Nashville, Tenn., on brief for defendant-appellee.

Before PHILLIPS, Chief Judge, EDWARDS, Circuit Judge, and McALLISTER, Senior Circuit Judge.

PHILLIPS, Chief Judge.

To what extent does a prosecuting attorney have civil immunity in a suit filed by a defendant whom he has prosecuted in a criminal proceeding? This recurring question is presented on the present appeal.

The defendant-appellee is the District Attorney General for the Twenty-sixth Judicial District of Tennessee. He was prosecuting attorney at a trial resulting in the conviction of plaintiff-appellant Hilliard for second degree murder. This conviction was reversed by the Tennessee Court of Criminal Appeals on April 15, 1971. At the second trial Mrs. Hilliard was acquitted. In the meantime she had served one year in prison.

The evidence upon which Mrs. Hilliard was convicted at her first trial was entirely circumstantial. A key issue was whether stains on the nylon jacket worn by her at the time of her arrest were blood stains, and if so, whether the stains were from human blood as contended by the prosecution or hog blood as contended by the defense.

In reversing the conviction, the Tennessee Court of Criminal Appeals said:

> "Of quite devastating impact tending to show guilt was the fact that the defendant had what appeared to be blood stains on her jacket. The State introduced proof of this, and then it was revealed that the jacket itself had been sent to the F.B.I. laboratory in Washington D. C. for chemical analysis and, although some three months had passed since the jacket had been taken from the defendant, it had not been returned for use at the trial; nor was there any information available to shed light on the vital issue of whether the blood was human as theorized by the State or hog as theorized by Mrs. Hilliard.
>
> "Although, as aforesaid, no opportunity was allowed the trial court to correct any error that might have been involved in allowing the State's proof concerning the blood being on the jacket when it developed that the jacket itself was, by State action, unavailable, and thus we cannot consider the propriety of the court's rulings on the objections made during trial; the impact of this testimony does enter into our decision. The proof offered by the State relative to this blood was circumstantial as was all the other. But here there was an opportunity to make available to the jury direct

> proof, in the face of the defendant's testimony that the blood was that of a hog, that would have supported one theory and discredited the other. Either the blood was human or swine. It is had been established as human, this would have left little room for doubt that the defendant was not telling the truth in her explanation of how she got blood on her clothing. If it developed that the blood was from a hog, this would have proved conclusively that she was telling the truth, in this particular at least.
>
> "Certainly the two hypotheses suggested by the proof of blood on the jacket—one tending strongly to suggest guilt, the other tending to support the theory of the defendant—are equally reasonable. In its present condition the evidence offered by the defendant buttressed by the presumption of innocence never overcome by sufficient proof preponderates against the verdict."

Following her acquittal at the second trial, Mrs. Hilliard filed the present civil action for damages against the District Attorney General. Jurisdiction is asserted both on the ground of diversity of citizenship and under the civil rights act, 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3).[1]

The District Attorney General filed a motion to dismiss pursuant to Rule 12(b)(6), Fed.R.Civ.P. for failure to state a claim on which relief can be granted. The District Court sustained this motion, holding that the District Attorney General is immune from civil liability. We reverse, holding that the District Court erred in ruling that the complaint does not state a claim on which relief can be granted.

This is an interlocutory appeal under 28 U.S.C. § 1292(b). The District Court certified that the order of dismissal involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation. The District Court also directed the entry of final judgment as to the District Attorney General, making an express determination that there is no just reason for delay. Rule 54(b), Fed.R.Civ.P. This court granted leave to appeal.

[1, 2] Our reversal is based entirely upon the factual averments of the complaint, which are summarized hereinafter in this opinion. These averments must be treated as true for purposes of this appeal and are viewed in the light most favorable to Mrs. Hilliard. Lucarell v. McNair, 453 F.2d 836 (6th Cir. 1972), L'Orange v. Medical Protective Society, 394 F.2d 57, 59 (6th Cir. 1968). "In appraising the sufficiency of this complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." Conley v. Gibson, 355 U.S. 41, 45–46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

The complaint avers that Mrs. Hilliard is a citizen of Indiana; on or about December 24, 1969, she arrived in Carroll County, Tennessee, to visit her maternal aunt, Vina Prince, and the aunt's husband, Ernie Prince; the purpose of her visit was to assert and settle her claim to a one-half interest in certain real estate inherited from her grandmother; Ernie Prince had operated the land for many years and had claimed ownership from time to time; on February 19, 1970, Ernie Prince was killed and Mrs. Hilliard was arrested and charged with his murder.

The complaint further states that at the time of her arrest Mrs. Hilliard was wearing a blue nylon jacket which the officers claimed was stained with the

1. The other defendant is the Resident Agent of the Tennessee Bureau of Investigation, who filed an answer in the District Court. He is not a party on this appeal.

blood of Ernie Prince; the victim was murdered by two vicious axe blows to the skull, and the body thereafter was dragged to the rear of the house and shot in the mouth with a shot gun. Mrs. Hilliard asserted that when she was arrested there was no blood on her jacket, but if there were any such stains it was hog blood from preparing raw meat.

The complaint asserts that circumstantial evidence pointed the finger of guilt to Vina Prince, who is insane. The opinion of the State Court of Criminal Appeals pointed out that Mrs. Prince was not available as a witness, due to her mental condition. The court commented:

> "It is regrettable that she was not available as a witness . . . Since there is no doubt that this woman was present before, during, and after the assault of the deceased, her potential as a witness is quite evident. She could have witnessed the crime or have committed the crime herself."

It is averred that the only probative material evidence against Mrs. Hilliard was the allegedly blood stained jacket and some allegedly blood stained curtains; that the jacket and curtains were sent to the FBI laboratory in Washington, D. C., for analysis; that the FBI report was negative as to human blood, or any blood, being on either the jacket or the curtains; that the District Attorney General saw the FBI report well in advance of the trial and was familiar with its contents; that neither the FBI report nor the jacket and curtains were made available to be introduced in evidence at the trial; that the contents of the FBI report were never divulged to Mrs. Hilliard or her attorney; instead, it was claimed by the prosecution that the jacket and curtains had been resubmitted to the FBI on April 28, 1970, at a time when the trial already had been set for May 15, 1970, too late for them to be returned in time for introduction in evidence; that the District Attorney General produced evidence before the jury to the effect that the spots on the jacket and curtains "looked like" or "appeared to be" blood stains, in spite of the FBI report that there were no blood stains; that the District Attorney General suppressed and concealed the positive proof that there was no blood on either the jacket or curtains; and that if the FBI report had been introduced into evidence, Mrs. Hilliard would have been acquitted at her first trial as she was at the second.

The complaint further contains these averments:

> "22. That in the preparation of the case, the Defendant Williams advised or suggested or implied by some means that the witness Defendant Clark and perhaps others, should not mention anything about the first report of March 28, 1970, and that the Defendant Clark and other witnesses followed his instructions and answered both direct examination questions and cross-examination questions evasively, deliberately misleadingly, with half truths and in instances falsely, to carry out the complete suppression of the report of negative blood analysis of the items.
>
> "23. That the Defendant Williams to carry out his intention of concealing and suppressing the report, contrary to any interpretation of good practice, and knowing that the defense expected the production of the jacket and report of the examination thereof for human blood, the Complainant insisting that there was no blood or if blood then animal blood, not human, announced that the State was ready for trial well knowing he was not going to offer the jacket or curtains or the report, and that once the trial had commenced, the Complainant's defense counsel could not obtain the jacket or any report in time to use it for defense evidence in the trial, and thus suppressing and concealing the evidence which would acquit the Complainant.
>
> "24. That the Defendant Williams when the Complainant's defense counsel demanded the production of the jacket, or a continuance until it could be produced, knowingly and deliberately advised the Court that through no fault of the State or prosecutors the jacket was not immediately available, as a witness had testified, when he knew or should have known by diligent inquiry that the same was in the T.B.I. office in Nashville, and would have required only two and one-half (2½) hours to be available, and he well knew that the jacket was deliberately sent off on such a late date that its return by trial date was impossible, and he knew of the materiality of the jacket and report and should have announced its unavailability before commencement of the trial, and by these actions suppressed and concealed the evidence of the jacket and report favorable to the Complainant.
>
> "25. That the Defendant Williams knowingly procured and allowed witnesses such as the Defendant Donn Clark and perhaps others to mislead and deceive the Jury, Court, and criminal Defendant and her counsel, when he was aware of stronger evidence than that elicited from his witnesses, which was favorable to the criminal defendant, and failed and refused to reveal the favorable evidence and allowed the evidence he knew to be false to form the basis of the Complainant's conviction of murder in the second degree.
>
> "26. That both Defendants continued to suppress and conceal the report from the complainant's defense counsel, after the trial was concluded, knowing that the same would constitute a basis for a new trial for the Complainant and only disclosed the report when compelled by the opinion of the Court of Criminal Appeals which required that they do so, then revealing the same for the first time the 20th day of April, 1971.
>
> "27. That the Defendants and each of them, by the suppression and concealment, and by trickery, deceit, fraud, unethical practices and conduct for a public official, contrary to their oath of office and in violation of the Defendant's right to a fair trial and due process, were the direct and proximate cause of the Complainant being illegally and unlawfully confined in either the Carroll County Jail or the State Women's Prison in Nashville, and wrongfully deprived of her liberty and freedom, and further the direct and proximate cause of unbelievable mental pain and anguish as a result of being unlawfully and wrongfully imprisoned and branded forever as a convicted murderess, suffered day and night behind prison bars and of her earnings during the period of illegal confinement, which is not yet at an end, but which commenced May 12, 1970.
>
> "28. That thereafter, beginning on the 12th day of May, 1971, the complainant was retried in the Circuit Court of Carroll County, Tennessee, on the charge of murder, the said retrial being concluded on May 13, 1971, by a jury verdict of not guilty.
>
> "29. That the complainant and her counsel on that retrial had the use and benefit, knowledge, and probative evidentiary document and report dated March 26, 1970, from the F.B.I. Laboratory, to the effect that their scientific examination revealed no evidence of any blood, of any kind, human or animal, and in the said re-trial all material aspects of the proof were the same except as to the said report.
>
> * * * * * *
>
> "32. That the defendants individually, and jointly, by conspiring, combination, consort and agreement did conspire for the purpose of depriving either directly or indirectly, the complainant of the equal protection of the laws and of equal privileges and immunities under the laws; and under color of a state statute, ordinance, regulation, custom and usage of the State of Tennessee, caused the complainant to be subjected to the deprivation of her rights, provileges and immunities secured by the Constitu-

tion and laws of the United States, and while so doing were acting under color of state authority, and outside the scope of the jurisdiction of their respective offices, and without authority of law and that such actions were calculated or did, in fact, subject the complainant to a deprivation of her constitutional right to a fair trial and due process of law, and were the direct and proximate cause of the injuries, damages, wrongs and loss of liberty and freedom from May 13, 1970, to May 13, 1971, and as set out above."

[3] It is well settled that a prosecuting attorney, when acting in his official capacity, is immune from suit for damages, provided that his acts are within the scope of his jurisdiction and authorized by law. Peek v. Mitchell, 419 F.2d 575, 578 (6th Cir. 1970); Hurlburt v. Graham, 323 F.2d 723, 725 (6th Cir. 1963); Kenney v. Fox, 232 F.2d 288, 290 (6th Cir. 1956). See also Kauffman v. Moss, 420 F.2d 1270 (3rd Cir. 1970).

[4] However, the immunity of a prosecuting attorney from civil liability is not absolute:

> "[A] quasi-judicial officer, such as a prosecuting attorney, who acts outside the scope of his jurisdiction and without authorization of law, cannot shelter himself from liability by the plea that he is acting under color of office." Lewis v. Brautigam, 227 F.2d 124, 129 (5th Cir. 1955).

In McCray v. State of Maryland, 456 F.2d 1, 3 (4th Cir. 1972) the court said:

> "The immunity of quasi-judicial officers such as prosecuting attorneys and parole board members derives, not from their formal association with the judicial process, but from the fact that they exercise a discretion similar to that exercised by judges. Like judges, they require the insulation of absolute immunity to assure the courageous exercise of their discretionary duties. Where an official is not called upon to exercise judicial or quasi-judicial discretion, courts have properly refused to extend to him the protection of absolute judicial immunity, regardless of any apparent relationship of his role in the judicial system." (Footnotes omitted)

To like effect see: Madison v. Purdy, 410 F.2d 99, 101 (5th Cir. 1969); Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965). Cf. Lucarell v. McNair, 453 F.2d 836 (6th Cir. 1972); Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970); Manning v. Ketcham, 58 F.2d 948 (6th Cir. 1932).

See also the order of the Supreme Court denying application for mandamus and certiorari in Garrison v. Brown, 405 U.S. 985, 92 S.Ct. 1253, 31 L.Ed.2d 469 (1972), involving an action for civil damages against District Attorney Jim Garrison of New Orleans for his prosecution of Clay Shaw on the charge of conspiring to assassinate President John F. Kennedy.

The Code of Professional Responsibility adopted by the American Bar Association contains the following provisions with respect to the duties of a public prosecutor:

> "EC 7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused."
>
> "DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.
>
> "(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.
>
> "(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

[5] We hold that factual averments of the complaint as summarized above, considered in a light most favorable to plaintiff, charge the District Attorney General with acts which were outside his quasi-judicial capacity and beyond the scope of "duties constituting an integral part of the judicial process." We are not willing to extend the doctrine of quasi-judicial immunity to a complaint charging deliberate suppression of an FBI laboratory report establishing the innocence of the defendant.

Nothing in this opinion is intended to express any view as to the merits of the case. We do no more than hold that the District Judge erred in dismissing for failure to state a claim on which relief can be granted.

Reversed and remanded.

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APPENDIX A-2

WOOD v. STRICKLAND

Cite as 95 S.Ct. 992 (1975)

These considerations have undoubtedly played a prime role in the development by state courts of a qualified immunity protecting school officials from liability for damages in lawsuits claiming improper suspensions or expulsions.[12] But at the same time, the judgment implicit in this common-law development is that absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations.

[4] Tenney v. Brandhove, Pierson v. Ray, and Scheuer v. Rhodes drew upon a very similar background and were animated by a very similar judgment in

12. "[School directors] are authorized, and it is their duty to adopt reasonable rules for the government and management of the school, and it would deter responsible and suitable men from accepting the position, if held liable for damages to a pupil expelled under a rule adopted by them, under the impression that the welfare of the school demanded it, if the courts should deem it improper." Dritt v. Snodgrass, *supra*, 66 Mo. 286, 293 (1877).

construing § 1983. Absent legislative guidance, we now rely on those same sources in determining whether and to what extent school officials are immune from damage suits under § 1983. We think there must be a degree of immunity if the work of the schools is to go forward; and, however worded, the immunity must be such that public school officials understand that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity.

> "Public officials, whether Governors, Mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not

to decide or act at all." Scheuer v. Rhodes, *supra*, 416 U.S. at 241–242, 94 S.Ct., at 1689 (footnote omitted).

[5–7] The disagreement between the Court of Appeals and the District Court over the immunity standard in this case has been put in terms of an "objective" versus a "subjective" test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The official must himself be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. To be entitled to a special exemption from the categorical remedial language of § 1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his

charges. Such a standard neither imposes an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of § 1983. Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are "charged with predicting the future course of constitutional law." Pierson v. Ray, *supra*, 386 U.S., at 557, 87 S.Ct., at 1219. A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

Supreme Court, U. S.
FILED
JUN 16 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1974

No. 74-5435

PAUL KERN IMBLER,
Petitioner,

v.

RICHARD PACHTMAN, District Attorney,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR RESPONDENT PACHTMAN

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IN THE

Supreme Court of the United States

October Term 1974

No. 74-5435

PAUL KERN IMBLER, *Petitioner*,

v.

RICHARD PACHTMAN, District Attorney, *Respondent.*

BRIEF FOR RESPONDENT PACHTMAN

OPINIONS BELOW

The opinion and judgment of the United States District Court for the Central District of California of June 30, 1972 (Civ. No. 71-123-RJK) dismissing Mr. Imbler's action as to Mr. Pachtman, is found in the Appendix, pages 104 to 113, inclusive.

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the district court's judgment is reported at 500 F.2d 1301 (1974) and is found in the Appendix at pages 116 to 125, inclusive.

JURISDICTION

This action was filed in the United States District Court for the Central District of California on January 15, 1971, (A. 2), asserting claims under 42 U.S.C. Sections 1983 and 1985 and implicitly invoking federal jurisdiction under 28 U.S.C. Section 1343. (A. 61-81). The district court dismissed the action as to respondent Pachtman on June 30, 1972. (A. 7, 113). Petitioner Imbler filed a timely notice of appeal on July 7, 1972. (A. 7, 114). The Court of Appeals entered its judgment affirming the district court on July 12, 1972. (A. 116). A petition for rehearing was filed and was denied on September 10, 1974. (A. 126). Mr. Imbler filed his petition with this court for a writ of certiorari on October 17, 1974, alleging grounds specified in Rule 19(b), including a conflict among decisions of various circuits of the Court of Appeals. This Court granted certiorari on February 24, 1975, (A. 127), exercising its jurisdiction under 28 U.S.C. 1254 (1).

STATUTE INVOLVED

The statute in question is 42 United States Code Section 1983,[1] which reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[1] In his jurisdictional statement, petitioner relies solely on 42 U.S.C. §1983 [Brief of Petitioner, p. 11], although he presents a cluster of statutes on pages 12-19 of his brief, of which Section 1985 might be relevant and which is set out in full at pages 16 to 18 of Petitioner's Brief.

QUESTION PRESENTED

Is a state prosecutor absolutely immune, on the basis of quasi-judicial immunity, in a suit for damages under the Civil Rights Act, especially 42 U.S.C. Section 1983, for actions performed by him within his prosecutorial function in the questioning and production of witnesses during a state criminal proceeding?

It is submitted that the ten issues posed by Petitioner [Brief of Petitioner, pages 19-22] are encompassed by this single question.

STATEMENT OF CASE

On January 4, 1961, two men entered a Los Angeles market tended by Mr. Hasson and his wife. One of the men shot and fatally wounded Mr. Hasson. The men then left the store and departed in different directions. Mr. Costello, a passerby, heard the shot, saw a man with a gun leave the market, followed him, saw him discard his coat, and recovered the gunman's coat. A pistol, later identified as the murder weapon, and other items, were found in the coat. [A. 8-9, 14-15, 32-33.]

Ten days later, three men attempted to rob a Po-

mona gas station. While escaping from the scene of the robbery, their vehicle overturned and one accomplice, Leonard Lingo, was killed. Two days later Mr. Imbler surrendered to the police on the robbery charge. [A. 15, 34]. Suspecting a link with the January 4th murder, the police showed Mrs. Hasson a photograph of Mr. Lingo, whom she identified as the accomplice of the gunman who murdered her husband. She could not identify the gunman. [A. 15, 32, 34].

Mr. Costello identified Mr. Imbler as the gunman. Two other eyewitnesses identified Mr. Imbler as the gunman or placed him at the scene of the murder. [A. 15, 33, 34.] All attempts to tie the physical evidence to Mr. Imbler were fruitless. [A. 15.]

Mr. Imbler was tried before a jury and was convicted of murder in the Superior Court of the State of California for the County of Los Angeles in July of 1961. [A. 8, 104]. Richard Pachtman was the deputy district attorney of the County of Los Angeles who prosecuted Mr. Imbler on behalf of the People of the State of California [A. 105.]

Mr. Imbler was sentenced to death. [A. 8, 14, 104.] The conviction was affirmed by the California Supreme Court on May 17, 1962. *People* v. *Imbler* (1962) 57 Cal.2d 711, 371 P.2d 304, (A. 8). On June 29, 1962, Mr. Imbler was ordered to be executed on September 12, 1962. *People* v. *Imbler*, No. 240368, *Minutes of June 29, 1962.*

Thereafter, Mr. Pachtman, upon information from Adult Authority investigators and with their further help, gathered [A. 28] and transmitted to the Governor's clemency review board certain information[2] (Appendix A) which tended to support petitioner's alibi. [A. 28, 35].

Mr. Imbler then sought habeas corpus relief in the California courts, to a major extent on the basis of the information transmitted to the Governor by Mr. Pachtman. Amicus and later counsel for petitioner,[3] Gregory S. Stout, in his brief filed with the California Supreme Court in *In re Imbler* (1963) 60 Cal.2d 554 on October 26, 1962, described Mr. Pachtman's actions in further investigating the case and in reporting the information to the Governor as follows:

> "In the highest tradition of law enforcement and justice, there is no greater example of devotion to duty that has come to my attention than the conduct of Richard Pachtman, the trial deputy District Attorney and the investigators from the Adult Authority. . ." (Amicus Brief submitted by Gregory S. Stout, pages 24-25.)[4]

The California Supreme Court appointed Justice White, recently retired from that court, as a referee

---

[2]See Mr. Pachtman's letter of August 17, 1962 to Governor Brown, attached hereto and incorporated herein as Appendix A, of which we ask this Court to take judicial notice as an official document and as an item discussed in the Reporter's Transcript of the Reference Hearing, Vol. II, pp. 467-477, in the case of *In re Imbler* (1963) 60 Cal.2d 554.

[3]Mr. Stout was counsel for Mr. Imbler on the original appeal (A.8) as well as on the state habeas corpus proceeding (A. 14).

[4]We request the Court to take judicial notice of this brief as part of the files *In re Imbler* (1963) 60 Cal.2d 554.

to take evidence concerning whether any witness who had testified against Mr. Imbler had committed perjury, and whether any representative of the State had knowingly caused or suffered any such perjury to be introduced at Mr. Imbler's trial, or had suppressed evidence favorable to Mr. Imbler. *In re Imbler* (1963) 60 Cal.2d 544; (A. 16). One of the four prosecution witnesses, Mr. Costello, whom Mr. Imbler's counsel describes as a "bum" [Brief of Petitioner at 52], recanted his trial testimony. [A. 17, 18.] Referee White "... had the opportunity to observe the witness (Costello) and judge his credibility and demeanor" as to the alleged perjured trial testimony and found his latest testimony to be impeached and discredited. *In re Imbler* (1963) 60 Cal.2d 554, 562, [A. 18, 27].

Based on the distinguished referee's findings, the California Supreme Court, in a full opinion reviewing the facts, discredited Costello's latest testimony and held that no perjured testimony had been given at trial and that no evidence favorable to Mr. Imbler had been suppressed at trial. *In re Imbler, supra,* 60 Cal.2d 554; [A. 18, 22, 24]. On a later writ, the California Supreme Court set aside the death penalty imposed on Mr. Imbler. *In re Imbler* (1964) 61 Cal.2d 556. Mr. Imbler then remained in prison serving concurrently both the murder and the later robbery sentences. [A. 31.]

Several years later, Mr. Imbler filed a federal habeas corpus petition alleging essentially the same grounds for overturning his conviction as had been

considered by the California Supreme Court. The federal district court did not conduct a separate hearing but merely reviewed the California Supreme Court's record.

> "A federal evidentiary hearing on the petitioner's claims was not held since the same contentions were presented in the writ of habeas corpus before the California Supreme Court." *Imbler* v. *Craven* (C.D. Cal. 1969) 298 F.Supp. 795, 797; [A. 32].

In one of the quirks of our federal system, the single federal district judge in essence reversed the decision of the California Supreme Court based on that court's own record. *Imbler* v. *Craven, supra,* 298 F.Supp. 795; [A. 30]. The district court concluded that certain "false," not perjured, testimony was given by two of the prosecution's four identification witnesses which was material to their credibility. *Imbler* v. *Craven, supra,* 298 F.Supp. at 803; [A. 42-43]. Moreover, it found that the prosecutor knew, or should have known, of the falsity of the testimony.

> "Therefore, as to each of the six items of false testimony described above, the court finds that the prosecutor had knowledge of such falsity, or, if he did not have actual knowledge, that he had reason to believe such testimony was false and his reckless use thereof in disregard of such reason is to be treated the same as knowing use of false testimony."
>
> *Imbler* v. *Craven, supra,* 298 F.Supp. at 809; [A. 53].

The Court of Appeals affirmed the district court's order and Mr. Imbler was released. *Imbler* v. *California* (9th Cir. 1970) 424 F.2d 631.

Under the doctrines applied by the Ninth Circuit, the statute of limitations for Mr. Imbler's claim was deemed tolled while he was in prison.[5] On January 15, 1971, Mr. Imbler filed his Civil Rights Act complaint in this case. [A. 2]. Mr. Pachtman's motion to dismiss was filed on November 2, 1971. [A. 4].

On April 18, 1972, the first amended complaint was filed. [A. 6, 61]. The district court dismissed the action as to Mr. Pachtman on June 30, 1972 [A. 7, 104-112, 113] on the grounds that Mr. Pachtman was entitled to quasi-judicial immunity for the actions of which Mr. Imbler complained. [A. 107-111]. The Court of Appeals affirmed the dismissal on the same basis. *Imbler* v. *Pachtman* (9th Cir. 1974) 500 F.2d 1301. [A. 116-120]. It is from this judgment that Mr. Imbler seeks review by this Court.

SUMMARY OF ARGUMENT

The issue is the nature of immunity to be accorded a prosecutor in a damage suit under the

[5]Cal. Penal Code §2600 provides that "A sentence of imprisonment . . . suspends all the civil rights of the person so sentenced . . ." Cal. Code Civ. Proc. §352(a) provides that "If a person entitled to bring an action . . . be, at the time of action accrued, either: . . . 3. Imprisoned on a criminal charge . . .the time of such disability is not a part of the time limited for the commencement of the action." The Ninth Circuit has concluded that the disability does not apply to actions under the Civil Rights Act and that prisoners may freely bring such actions, but that the tolling provision does apply to extend California's three year limitation for actions ". . . upon a liability created by statute . . ." Cal. Code Civ. Proc. §338(3). *Ney* v. *State of California* (9th Cir. 1971) 439 F.2d 1285, 1287.

Civil Rights Act. This Court has not yet authoritatively spoken on this issue. See *Holton* v. *Boman* (7th Cir. 1974) 493 F.2d 1176, 1177, n.2.

However, this Court has in the past approved an absolute immunity in damage actions for federal prosecutors in the performance of their prosecutorial function. *Yaselli* v. *Goff* (2d Cir. 1926) 12 F.2d 396, aff'd. 275 U.S. 503, approved *Barr* v. *Matteo* (1959) 360 U.S. 564, 3 L.Ed.2d 1434, 79 S.Ct. 1335.

Immunities were as much a part of common law causes of action for damages as was liability itself. Judicial immunity (*Floyd* v. *Barker*, 12 Co. Rep. 23, 1608) and the immunity of counsel, witnesses, and judges for slander or libel for words written or spoken in the ordinary course of any judicial proceeding (see *Spalding* v. *Vilas*, 161 U.S. 483, 497, 40 L.Ed. 780, 785, 1895) are of ancient origin.

The enactment of the Civil Rights Act did not abrogate all common law immunities. *Pierson* v. *Ray*, 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967). Specifically it did not abrogate the common law immunities of legislators for legislative acts (*Tenney* v. *Brandhove* 341 U.S. 367, 379, 95 L.Ed. 1019, 71 S.Ct. 783, 1951) or of judges for judicial acts. *Pierson* v. *Ray*, *supra* 386 U.S. at 554, 18 L.Ed.2d at 294. Nor did it abolish the American common law defense of good faith and probable cause for a peace officer making an arrest. *Pierson* v. *Ray*, *supra*, 386 U.S. at 555, 18 L.Ed.2d at 295. Recently, this Court approved a

qualified official immunity for damage actions under the Act against state executives (*Scheuer* v. *Rhodes* (1974) ..... U.S. ....., 40 L.Ed.2d 90, ... S. Ct.....) and school board members (*Wood* v. *Strickland* (1975) ..... U.S. ....., 43 L.Ed.2d 214, 95 S.Ct. 992).

Every opinion of the Court of Appeals which has considered the matter has held that state prosecutors are entitled to some form of immunity in damage suits under the Civil Rights Act. Overwhelmingly, these opinions hold that a prosecutor is entitled to an absolute quasi-judicial immunity, akin to that of a judge, for actions taken in the scope of his prosecutorial function. However, the Sixth Circuit has indicated that the immunity should not encompass intentional misconduct of a serious nature. *Hilliard* v. *Williams* (6th Cir. 1972) 465 F.2d 1212, cert. den. 409 U.S. 1029.

The parallel common law immunity of counsel for defamation arising out of verbal and written material presented in the ordinary course of a judicial proceeding is an absolute one. It defies logic to have the same act, e.g. posing a question to a witness, be absolutely immune in a damage action for defamation but not in one for violation of civil rights.

An absolute immunity is not only most in accord with precedent but is justified and required by important societal interests. The absolute immunity is workable since an objectively defined prosecutorial function can be identified.

The *Hilliard* case stands out as an aberrant episode in the law of immunity. It is almost devoid of reasoning and does not consider the workability of its standard or its impact on the societal interests promoted by prosecutorial immunity.

The Ninth Circuit's decision in *Imbler,* on the other hand, is directly in the flow of cases, such as *Robichaud* v. *Ronan* (9th Cir. 1965) 351 F.2d 533, which have analysed the conflicting interests in depth and have defined an objective, quasi-judicial function of prosecutors to which absolute immunity pertains.

There can be no serious question that the actions of which Mr. Imbler complains, were within the objective scope of Mr. Pachtman's prosecutorial functions. All of the actions took place in a courtroom in the questioning of a witness on the stand or in preserving the presence of a witness for testimony. If absolute immunity applies to any prosecutorial act it must encompass these actions.

ARGUMENT

I

HISTORICALLY THE COMMON LAW HAS RECOGNIZED THE NEED FOR ABSOLUTE IMMUNITY FROM DAMAGE SUITS FOR JUDICIAL AND QUASI-JUDICIAL ACTIONS

A. THE COURTS HAVE RECOGNIZED A COMMON LAW ABSOLUTE IMMUNITY FROM DAMAGES FOR PROSECUTORIAL ACTS IN NON-CIVIL RIGHTS ACT SUITS

The common law has historically recognized the need to protect judges and others closely identified with the judicial process from the threat of damage suits for actions taken within the scope of their judicial or quasi-judicial functions. See *Scheuer* v. *Rhodes* (1974) ..... U.S. ..... 40 L.Ed.2d 90, 98 n. 4. This immunity has been applied in non-Civil Rights Act damage suits against federal prosecutors.

In 1926, the Court of Appeals for the Second Circuit was confronted with a suit for damages against a special assistant to the Attorney General, named Goff, who was specially appointed to prosecute a single case against Mr. Yaselli before a federal grand jury. Goff was charged with: (1) maliciously obtaining the appointment in order to carry out his scheme against Mr. Yaselli; (2) maliciously and without probable cause charging Yaselli with a crime; and (3) ". . . maliciously, willfully, and corruptly caus [ing] to be introduced and used before the aforesaid grand jury

a great mass of false, misleading . . . irrelevant . . . testimony, and evidence." *Yaselli* v. *Goff* (2d Cir. 1926) 12 F.2d 396, 397-398.

The court, in a scholarly opinion, traced the history of judicial and quasi-judicial immunity back to the time of Lord Coke (Id. at 399) and noted the parallel absolute immunity for defamation. Id. at 403. The court discussed the policies behind the rule of absolute judicial immunity and concluded that they apply equally to a prosecutor.

> "The [prosecutor's] immunity is absolute, and is grounded on principles of public policy. The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions. They should be no more liable to private suits for what they say and do in the discharge of their duties than are the judges and jurors, to say nothing of the witnesses who testify in a case."
>
> *Yaselli* v. *Goff, supra,* 12 F.2d at 406.

The court held that a prosecutor was entitled to absolute immunity for the acts charged.

> "A United States attorney, if not a judicial officer, is at least a quasi-judicial officer, of the government. He exercises important judicial functions, and is engaged in the enforcement of the law. The reasons for granting immunity to judges, jurors, attorneys, and executive officers of the

government apply to a public prosecutor in the performance of the duties which rest upon him."

Yaselli v. *Goff, supra,* 12 F.2d at 404.

The Supreme Court summarily affirmed[6] the decision in *Yaselli* v. *Goff, supra,* (see 275 U.S. 503), prompting Judge Learned Hand in a subsequent classic opinion on immunity to conclude:

"Upon appeal the Supreme Court affirmed this judgment [*Yaselli* v. *Goff*] in a per curiam opinion on the authority of *Bradley* v. *Fisher* and *Alzua* v. *Johnson*. Both those decisions concerned the privilege of a judge, and held that it was absolute, even though his decision was not the result of an honest effort to apply the law to the facts before him, but of a desire to gratify his personal ill-will against the defeated suitor. Thus the conclusion is inevitable that the Supreme Court took the same view as we: i.e., that officers of the Department of Justice, when engaged in prosecuting private persons enjoy the same absolute privilege as judges."

Gregoire v. *Biddle* (2d Cir. 1949) 177 F.2d 579, 580 (footnotes omitted).

The Supreme Court again approved the *Yaselli* doctrine of quasi-judicial immunity in 1959 as follows:

"This Court early held that judges of courts of superior or general authority are absolutely privi-

[6]Summary affirmances are generally accorded qualified precedential value, see *Edelman* v. *Jordan* (1974) 415 U.S. 651, 671, 39 L.Ed2d 662, 677, 94 S.Ct. 1347, 1359.

leged as respects civil suits to recover for actions taken by them in the exercise of their judicial functions, irrespective of the motives with which those acts are alleged to have been performed, Bradley v. Fisher (U.S.) 13 Wall 335, 20 L.Ed. 646, and that a like immunity extends to officers of government whose duties are related to the judicial process. Yaselli v. Goff (CA2 N.Y.) 12 F.2d 396, 56 A.L.R. 1239. aff'd per curiam 275 U.S. 503, 7 L.Ed. 395, 48 S.Ct. 155, involving a Special Assistant to the Attorney General."

Barr v. *Matteo,* 3 L.Ed.2d 1434 at 1440, 360 U.S. 564 at 569-570, 79 S.Ct. 1335 (1959).

The Court of Appeals has supported the common law immunity for federal prosecutors by analogizing their position to that of state prosecutors under the Civil Rights Act and noting that there is no reason to distinguish between prosecutorial immunity under the Civil Rights Act and under the common law.

"Bauers v. Heisel [361 F.2d 581, 3rd Cir. 1965] would seem to compel the result that an Assistant United States Attorney is clothed with judicial immunity, unless there is some reason to distinguish between the liability of State prosecutors under the Civil Rights Act and the liability of federal prosecutors under the federal common law created by the *Bivens* [*Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388. 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)] decision. We perceive no reason for such a distinction."

Bethea v. *Reid* (3rd Cir. 1971) 445 F.2d 1163 1166, cert. den. 404 U.S. 1061.

The interests supporting prosecutorial immunity apply equally to state as to federal prosecutors. Looked at solely from the point of the common law, state as well as federal prosecutors are entitled to absolute, quasi-judicial immunity for their prosecutorial acts.

B. THE COMMON LAW ABSOLUTE PRIVILEGE FOR COUNSEL IN DEFAMATION SUITS COMPELS A PARALLEL ABSOLUTE PROSECUTORIAL IMMUNITY

The American common law has always recognized an absolute immunity in defamation actions for counsel engaged in judicial proceedings. Professor Prosser states the rule as follows:

> "As in the case of other acts in his judicial capacity, therefore, the judge is absolutely privileged as to any defamation he may utter, even though he knows it to be false and is motivated by personal ill will towards the plaintiff . . . Likewise the privilege extends to counsel in the conduct of the case. . . ."
>
> Prosser, *Handbook on the Law of Torts,* §114, p. 777-778 (4th Ed. 1971) (footnotes omitted); see also *Yaselli* v. *Goff, supra.* 12F.2d at 403.

One excellent article which reviewed American and English law on the subject up to 1909 summarized the law and the policies behind it as follows:

> "Absolute privilege has been conceded on obvious grounds of public policy to insure freedom of speech where it is essential that freedom of speech

> should exist. It is essential to the ends of justice that all persons participating in judicial proceedings (to take a typical class for illustration) should enjoy freedom of speech in the discharge of their public duties or in pursuing their rights, without fear of consequences. The purpose of the law is, not to protect malice and malevolence, but to guard persons acting honestly in the discharge of a public function, or in the defense of their rights, from being harassed by actions imputing to them dishonesty and malice. Freedom from vexatious litigation for honest participants is so important that the law will not take the risk of subjecting them to such danger in order that a malicious participant may be mulcted in damages. The true doctrine of absolute immunity is that, in the public interest, it is not desirable to inquire whether utterances on certain occasions are malicious or not. It is not that there is any privilege to be malicious, but that, so far as it is a privilege of the individual, the privilege is to be exempt from all inquiry as to malice; the reason being that it is desirable that persons who occupy certain positions, as judges, jurors, advocates, or litigants, should be perfectly free and independent, and that, to secure their independence, their utterances should not be brought before civil tribunals for inquiry on the mere allegation that they are malicious."
>
> Veeder, *Absolute Immunity in Defamation: Judicial Proceedings,* 9 Columbia L.Rev. 463, 469 (1909), (footnotes omitted).

The rule in England at present also protects coun-

sel against damage actions for defamation. In a case holding that a criminal defendant could not sue his barrister for malpractice, Lord Upjohn said:

> "It is all part and parcel of the long-established general policy that judges, witnesses and counsel must be immune from actions arising out of their conduct during the course of litigation in the public interest."
>
> *Rondel v. Worsley* (1969) 1 A.C. 191 at 284.

The common law immunity for defamation is obviously not directed *against* persons injured by defamation but is intended to *protect certain actions* in judicial proceedings, including the filing of pleadings, the questioning of witnesses, and the conduct of the trial. The freedom of the participants in a judicial proceeding from the fear of civil liability is deemed to advance the pursuit of justice and to outweigh private claims for compensation.

However, if the very same acts, that is, filing pleadings, questioning witnesses, and conducting the trial, might expose counsel to civil liability under 42 U.S.C. §1983, although not to liability for defamation, the purpose of the historic immunity for defamation would have been substantially undercut. The defamation immunity would no longer achieve its purpose by protecting certain acts; it would merely have the random and meaningless function of defeating liability of a certain kind. Any skilled pleader could always avoid its effect when drafting a complaint against a state prosecutor.

In this case, the essential claims against Mr. Pachtman arise from his questioning of witnesses during a trial. Those acts would unquestionably be accorded absolute immunity in a defamation suit. Yet Mr. Imbler seeks to make the very same acts the basis of a Civil Rights Act damage suit. If Mr. Imbler prevails, no prosecutor could freely question a witness at trial without fear of civil liability, regardless of the defamation immunity. Consequently, unless a prosecutor is accorded absolute immunity under the Civil Rights Act for prosecutorial acts of the type charged, this Court will have effectively abrogated the substance of the historic defamation immunity as well as the parallel quasi-judicial, prosecutorial immunity.

II

A PROSECUTOR IS ENTITLED TO QUASI-JUDICIAL IMMUNITY IN DAMAGE ACTIONS UNDER THE CIVIL RIGHTS ACT

A. INTRODUCTION

The Civil Rights Act, which is a shield against the misuse of state power, is itself subject to abuse. One federal district court reflected that many prisoners do not view a civil action, under the Civil Rights Act or otherwise, as providing ". . . for the redress of genuine grievances or wrongs, but as a blackjack to be used indiscriminately, maliciously, and at will to harass and annoy not only their jailers, but Judges, Jurors, witnesses and everyone having to do with

their conviction." *Roberts* v. *Barbosa* (S.D. Cal. 1964) 227 F.Supp. 20, 21. The Ninth Circuit has noted ". . . that frivolous Civil Rights suits by prison inmates have become a matter of concern to district courts." *Allison v. California Adult Authority* (9th Cir. 1969) 419 F.2d 822, 823. The historic immunities of judicial and quasi-judicial officers were developed to guard against such abuses and should not be deemed abrogated by the Civil Rights Act.

B. JUDICIAL AND QUASI-JUDICIAL IMMUNITY APPLY UNDER THE CIVIL RIGHTS ACT

The Civil Rights Act did not abrogate all common law immunities. This Court has specifically held that judicial and legislative common law immunities were not abolished by the Act.

> "We do not believe that this settled principle of law was abolished by §1983, which makes liable 'every person' who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held in *Tenney v. Brandhove,* 341 U.S. 367, 95 L.Ed. 1019, 71 S.Ct. 783 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine."
>
> *Pierson v. Ray,* 386 U.S. 547, 555, 18 L.Ed.2d 288, 295, 87 S.Ct. 1213 (1967); see also *Wood v. Strickland* (1975) ..... U.S. ....., 43 L.Ed.2d 214, 222, 95 S.Ct. 992, 998.

Moreover, this Court has held that a peace officer's American common law defense of good faith and probable cause in making an arrest was not abrogated by the Civil Rights Act. *Pierson v. Ray, supra,* 386 U.S. at 555, 18 L.Ed.2d at 295, 87 S.Ct. 1213.

In the recent case of *Scheuer v. Rhodes, supra,* ..... U.S. ....., 40 L.Ed.2d 90, the Court discerned no historic common law absolute immunity for all executive actions. Indeed, the Court noted that peace officers traditionally lacked immunity for damages and merely had a defense of good faith and probable cause. Id., 40 L.Ed2d at 102. The Court emphasized another historic concern with respect to executive use of military force:

> "While both federal and state laws plainly contemplate the use of force *when the necessity arises,* the decision to invoke military power has traditionally been viewed with suspicion and skepticism since it often involves the temporary suspension of some of our most cherished rights—government by elected civilian leaders, freedom of expression, of assembly and association."
>
> *Scheuer* v. *Rhodes, supra,* 40 L.Ed.2d at 102 (Emphasis added).

Nevertheless, the Court found that a "qualified immunity" was available to state executives for of-

ficial acts within the jurisdiction of the officer. Id., 40 L.Ed.2d at 103. However, on the pleadings the Court could not determine whether the Government had jurisdiction[7] to take the action in question. *Ibid.*

Again in the recent case of *Wood v. Strickland, supra,* the Court relied on "common-law tradition" in construing Section 1983 to encompass a qualified immunity for school board members.

We have shown in Section I that the courts have recognized a common law quasi-judicial immunity for prosecutors. Significantly every circuit has held that the Civil Rights Act does not abrogate quasi-judicial immunity for prosecutorial acts. See Appendix B. Even the *Hilliard* opinion recognizes the applicability of the doctrine of quasi-judicial immunity to damage actions brought against prosecutors under the Civil Rights Act.

> "It is well settled that a prosecuting attorney, when acting in his official capacity, is immune from suit for damages, provided that his acts are within the scope of his jurisdiction and authorized by law. (Citations)."
>
> *Hilliard* v. *Williams* (6th Cir. 1972) 465 F.2d 1212, 1217.

The only question presented by the cases is the

[7]The qualified immunity discussed in *Scheuer* does not seem to turn on the motive of the executive but on whether he had authority *prima facie,* setting aside motive, to take the action in question. Good faith is relevant only to the extent that (a) the existence of reasonable grounds to believe that military force was necessary, and (b) the existence of a good faith belief that such force was necessary are jurisdictional prerequisites for the Governor's use of military force. *Scheuer* v. *Rhodes, supra,* 40 L.Ed.2d at 103.

parameters of the quasi-judicial immunity. For this purpose, we must examine the interests supporting the immunity.

III

THE PUBLIC INTEREST SUPPORTS ABSOLUTE IMMUNITY FROM DAMAGE SUITS FOR PROSECUTORIAL ACTS

A. GENERAL

> "In all such cases [claims of privilege from liability] the ground of decision is policy; and the advantages to the community, on the one side and the other, are the only matters really entitled to be weighed."
>
> Oliver Wendel Holmes, Jr., *Privilege, Malice, and Intent,* VIII Harv. L. Rev. 1, at 9 (1894).

The interests supporting prosecutorial immunity are set out in Table I in summary form. These interests militate as well against suits in which malice is alleged as in those in which mere negligence or error is claimed. In each case, the interest is injured if the officer is threatened with the harassment of a suit and the possibility of paying damages.

TABLE I

INTERESTS SUPPORTING ABSOLUTE IMMUNITY FROM CIVIL DAMAGES FOR ACTIONS PERFORMED WITHIN PROSECUTORIAL FUNCTION

A. INTERESTS RELATING TO PURSUIT OF JUSTICE

1. Civil damage suits might tend to discourage fearless prosecution and decision making, which duty owed to the public in general, outweighs any duty owed to an individual. See *Pierson* v. *Ray,* 386 U.S. 547, 554; *Bradley* v. *Fisher,* 80 U.S. (13 Wall) 335, 350 (1872).
2. The fear of civil liability might dissuade prosecutors from revealing candidly to the courts or clemency boards weaknesses in the prosecution's case or later discovered evidence, thus injuring the pursuit of justice.
3. The background element of a potential civil damage action might warp the habeas corpus and appellate proceedings, by making judges less willing to find prosecutorial misconduct, and by making government attorneys more unbending and less willing to confess error, thus injuring the pursuit of justice.

B. INTERESTS RELATING TO ADEQUACY OF OTHER REMEDIES

4. A person injured by a wrongful prosecutorial act can immediately seek redress through writs, appeal, or habeas corpus. See Table II. cf. interests supporting judicial immunity: *O'Shea* v. *Littleton* (1974) 414 U.S. 488, 502, 38 L.Ed.2d 674, 687.
5. The prosecutor is subject to more restraints, review, and penalties, including criminal penalties, for wrongful conduct than a private citizen and the deterrent of a civil damage suit is not necessary to enforce proper behavior. See Table II. Compare: *O'Shea* v. *Littleton, supra,* 38 L.Ed.2d at 687.

C. INTERESTS RELATING TO OBTAINING QUALITY PERSONNEL

6. Damage actions, often accruing years after a trial, would discourage many of the most qualified persons from becoming prosecutors. See E. Jennings, *Tort Liability of Administrative officers,* 21 Minn. L.Rev. 263, 271 (1937).

D. INTERESTS RELATING TO JUSTICE SYSTEM ADMINISTRATION

7. The necessity to defend suits alleging malice or wrongdoing would result in a waste of the prosecutor's time and a diversion of his efforts from the public interest in prosecution to the lesser interest in remedying private civil wrongs. See *Bradley* v. *Fisher,* 80 U.S. (13 Wall.) 335, 348 (1872).
8. The nature of the claim against a prosecutor for prosecutorial acts involves a kind of collateral attack on a criminal judgment, in which testimony of the trial judge and the jurors as to the impact of the prosecutor's

actions would often be relevant, which would create uncertainty and confusion in the criminal justice system. See *E. Jennings, supra,* p. 271 and *Rondel* v. *Worsley* (1969) 1 A.C. 191.

9. The fear of civil liability might affect the prosecutor's conduct of the trial, taking actions (e.g. calling needless witnesses) to protect against future civil claims although unnecessary for prosecution, resulting in a waste of judicial time and a slowing of the criminal justice system.[8]

E. INTERESTS RELATING TO FAIRNESS

10. It is unfair to demand that prosecutors reveal flaws in their case and evidence adverse to the prosecution and then to permit civil damage suits to be based in part on such evidence or flaws revealed.

11. It is unfair to demand of prosecutors a quasi-judicial standard of behavior,[9] over and above that of a mere adversary, and then to refuse them the immunity from damage suits for such actions accorded to judges.

12. Unlike a private citizen, a prosecutor has a duty to undertake affirmative action

[8]See Rondel v. Worsley (1969) 1 A.C. 191, 228-229, in which Lord Reed said:

> "So I think it not at all improbable that the possibility of being sued for negligence would at least subconsciously lead some counsel to undue prolixity which would not only be harmful to the client but against the public interest in prolonging trials."

[9]"The prosecutor's objective is justice; his role is not that of a mere advocate." A. 53, see also A.B.A. Standard EC 7-13. "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict," quoted in *Hilliard* v. *Williams* (6th Cir. 1972) 465 F.2d 1212, 1217.

in charging and prosecuting wrongdoers and is not free to avoid the risks of liability or suit by non-action and consequently should not be penalized for fearless prosecutorial acts; see Harper and James, *Laws of Torts,* Vol. 2, p. 1634.

F. INTERESTS RELATING TO DIFFICULTY OF PROOF

13. The nature of the claim against a prosecutor involves the mental processes of a decision maker in a specialized area, which would be subject to lay jury opinion and perhaps to the second guessing of other experts, which result would be undesirable. See E. Jennings, *supra,* 21 Minn. L.Rev. at 273.

14. Proving damages against the prosecutor would often require speculation as to the effect the violation had on the conviction which would often require retrying the criminal case in the civil action with different standards of proof and rules of procedure.

B. COMPELLING INTERESTS REQUIRE PROTECTION AGAINST SUIT AND NOT MERELY A DEFENSE AGAINST A JUDGMENT

This Court recognized that immunity from suit and not merely a defense against possible judgment was required by the public interest in holding for an absolute privilege against defamation suits for acts within the scope of official duty.

> ". . . [One competing interest is] the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities."
>
> *Barr* v. *Matteo,* 360 U.S. 564, 565, 3 L.Ed.2d 1434, 1438, 79 S.Ct. 1335 (1959).

Lord Fry's statements with respect to the absolute privilege of witnesses and judges in suits for defamation are equally valid with respect to quasi-judicial immunity for prosecutors.

> "It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions."
>
> *Munster* v. *Lamb* (1883) 11 Q.B.D. 588, 607 C.A., quoted approvingly by Lord Reid in *Rondel* v. *Worsley* (1969) 1 A.C. 191 at 229.

In the analogous situation of legislative immunity this Court focused on the fact that the immunity should not be based on a trial decision as to motive.

> "The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of judgment against them based upon a jury's speculation as to motives."
>
> *Tenney* v. *Brandhove,* 341 U.S. 367, 377, 95 L.Ed. 1019, 1027, 71 S.Ct. 783 (1951).

In a fine article reviewing the policies supporting judicial immunity, the writer reached the following conclusion, having equal applicability to quasi-judicial immunity:

> "The cumulative effect of the suggested reasons for the immunity . . . would appear sufficiently to justify its inclusion of malice, in that malice, equally with any other basis of liability, is subject to the vagaries of proof and capable of fictitious allegation in purely vexatious suits infringing upon judicial time, impartiality, independence, and finality."
>
> Jennings: *Tort Liability of Administrative Officers,* 21 Minn. L. Rev. 263, 273, (1936).

The courts have always been properly concerned with the impact of defending a suit, and not merely with the outcome of the trial. This Court almost a century ago noted a tendency to ascribe malice to any undesired result.

"Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge . . . [T]he disappointment occasioned by an adverse decision, often finds vent in imputations of this character, and from the imperfection of human nature this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action."

Bradley v. *Fisher supra,* 80 U.S. (13 Wall.) at 348, 20L.Ed. at 650.

The Court went on the say:

"The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into, judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence."

Bradley v. *Fisher, supra,* 80 U.S. (13 Wall.) at 354, 20 L.Ed. at 651.

Judge Learned Hand cogently stated the need for an objective standard protecting against suit as well as trial, as follows:

> "... [I]t is impossible to know whether the claim is well founded until the case has been tried, and ... to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to satisfy a jury of his good faith."
>
> *Gregoire* v. *Biddle* (2d Cir. 1949) 177 F.2d 579, 581; quoted with approval in *Barr* v. *Matteo, supra,* 360 U.S. at 571, 3 L.Ed.2d at 1441.

Clearly, then the public interest supports a form of immunity which guards against the vexation and uncertainty of litigation rather than merely providing a qualified defense against judgment.

C. THE CONCEPT OF ALTERNATIVE REMEDIES AND RESTRAINTS SUPPORTS ABSOLUTE IMMUNITY

One cluster of interests which is generally cited to support judicial immunity is directly applicable to the quasi-judicial immunity of prosecutors: those relating to the availability of other restraints to prevent misconduct and of other remedies to correct the effects of any misconduct.

The Court in *Bradley* addressed itself to the first of these considerations as follows:

> "In this country the judges of the superior courts of record are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office. If in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily or oppressively, they may be called to an account by impeachment and suspended or removed from office."
>
> *Bradley* v. *Fisher, supra.* 80 U.S. (13 Wall.) at 350, 20 L.Ed. at 650.

Veeder suggests that the parallel defamation immunity in judicial proceedings is also supported by the concept of alternative remedies and restraints, which has equal applicability to prosecutorial actions.

> "Moreover, underlying this whole doctrine of absolute immunity is the conception of an alter-

native remedy. Although the law, for reasons of public policy, denies an action for defamation, the occasions to which immunity applies almost always afford other remedies, which minimize, if indeed they do not always afford adequate relief for, the damage which a person defamed may have sustained . . . In the case of judicial proceedings, in which the rule of immunity has the widest scope, the underlying idea is that there is a tribunal whose proceedings are governed by formal methods specially designed for the orderly and efficient performance of the functions of those who participate in them; a tribunal presided over by a judge or judicial officer, specially equipped for his duties by character, learning and experience, who has the power, and, presumably, the will, to regulate and discipline all those who participate or appear before him. Judicial procedure implies notice to persons in interest, with the right to appear in person and by witnesses in answer to any charges that may be made, and the right to a formal judgment by an impartial court and jury . . . Jurors, witnesses, counsel and parties litigant who overstep the bounds of decorum may be reprimanded, fined or punished by imprisonment, and the defamatory utterance may be expunged from the record."
>
> Veeder, *Absolute Immunity in Defamation, supra,* at 470-471.

This Court in denying equitable relief against a judge charged with discrimination noted that remedies for judicial misconduct existed in terms of: (1) a right

to a change of venue or substitution of the judge; (2) review on direct appeal or an postconviction collateral review; (3) disciplinary proceedings against the judge; (4) federal habeas corpus relief; and (5) federal criminal prosecution under 18 U.S.C. §242. *O'Shea* v. *Littleton* (1974) 414 U.S. 488. 38 L.Ed.2d 674, 687, 94 S.Ct. 669. All of these, save item (1), apply with equal vigor to state prosecutors together with a staggering array of other restraints and remedies set out below in Table II.

TABLE II

LEGAL RESTRAINTS ON, AND REMEDIES FROM, DISTRICT ATTORNEY'S PROSECUTORIAL MISCONDUCT DESPITE IMMUNITY FROM CIVIL DAMAGES

1. REMOVAL FROM OFFICE
   - (a) By Election: Cal. Const. Art. XI, §4(c); Los Angeles County Charter Art. IV §12
   - (b) By Recall: Los Angeles County Charter Art. XI §50
   - (c) By Judicial Process:
     - (i) upon accusation of "willful and corrupt misconduct in office" by a grand jury and trial.
       Government Code Sections 3060, 3073.
     - (ii) As added penalty upon conviction of crime showing official misconduct. Penal Code §661.
   - (d) By civil service discharge (of a deputy) Los Angeles County Charter Art. IX §34(13).

2. EQUITABLE POWER OF COURTS
   - (a) Federal Courts: 42 USC 1983, 1985, restrain bad faith harrassment, e.g., *Younger* v. *Harris* (1970) 401 U.S. 37, 27 L.Ed.2d 669 (injunctive); *Steffel* v. *Thompson* (1974) 415 U.S. 452, 39 L.Ed.2d 505 (declaratory).
   - (b) State Courts:
     - (i) Taxpayers' actions to prevent unlawful acts by public officials, Code of Civil Procedure Section 526a, see *Blair* v. *Pitchess* (1971) 5 Cal.3d 258, 268; *County of Los Angeles* v. *Superior Court* (2d Dist. 1967) 253 Cal.App.2d 670, 677-679.
     - (ii) State injunctive action by a person injured to prevent violation of his rights, Code of Civil Procedure 526; see *Pitchess v. Superior Court* (2d Dist. 1969) 2 Cal.App.3d 644, 648.
     - (iii) Federal Civil Rights Act equitable actions prosecuted in State courts, see *Brown* v. *Pitchess* (1975) 13 Cal.3d 518.
     - (iv) State declaratory relief actions, see *Zeitlin* v. *Arneberyh* (1963) 59 Cal.2d 901, 906.
3. SUPERVISION BY ATTORNEY GENERAL
   Cal Const. Art. V. Section 13; Gov. Code §12550

4. DIRECT JUDICIAL REVIEW

(a) e.g., mistrial, new trial,[10] exclusionary rule, jury instructions, see *Alderman* v. *United States* (1969) 394 U.S. 165, see also *Kaplan* v. *Superior Court* (1971) 6 Cal.3d 150.

(b) Control of court proceedings, Code of Civil Procedure Section 128.[11]

(c) Appeal (Penal Code §1235 et seq.), state habeas corpus (Penal Code Section 1473), Federal habeas corpus (28 U.S.C. §2254).

5. PROFESSIONAL REGULATION

California State Bar disciplinary proceedings

Bus. & Prof. Code §6000 et. seq., esp. §6043, 6077, and 6106; Rules of Professional Conduct foll. §6076, e.g., Rule 7-105.

"In presenting a matter to a tribunal, a member of the State Bar shall: (1) employ such means only as are consistent with truth, and shall not seek to mislead the judge, judicial officer or jury by an artifice or false statement of fact or law . . ." and rule 7-107

"A member of the State Bar shall not (a) Suppress any evidence that he or his client has a legal obligation to reveal or produce . . ."

[10]"When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: . . . 5. . . . [W]hen the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury." Penal Code 1181.

[11]Every Court shall have power: . . . 5. To control in the furtherance of justice, the conduct . . . of all . . . persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto.

6. REVIEW BY GRAND JURY

"The grand jury shall inquire into: . . . (c) the willful or corrupt misconduct in office of public officers of every description within the County."

Penal Code §919.

7. CRIMINAL PENALITIES

(a) Federal: 18 U.S.C. §242, see *O'Shea* v. *Littleton, supra,* 38 L.Ed.2d at 687-688.

(b) State: penalties for various acts.

(i) illegal wiretapping or eavesdropping Penal Code 632, 636.

(ii) Solicitation of perjury, Penal Code 653f.

(iii) false imprisonment, Penal Code 236, 237.

(iv) Maliciously procuring search or arrest warrant, Penal Code 170.

(v) Assaulting or beating a person under color of law, Penal Code 149.

(vi) False arrest under color or pretense of law, Penal Code 146.

(vii) Unlawfully influencing testimony, Penal Code 137.

(viii) Preventing or dissuading a witness from testifying, Penal Code 136.

(ix) Destroying or concealing evidence, Penal Code 135.

(x) Preparing false evidence, Penal Code 134.

(xi) Procuring execution of innocent man by perjury or subornation of perjury, Penal Code 128.

(xii) Subornation of perjury, Penal Code 127.

(xiii) Conspiracy, Penal Code 182:

"If two or more persons conspire: . . .

2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime.

3. Falsely to move or maintain any suit, action, or proceeding.

. . .

5. To . . . pervert or obstruct justice, or the due administration of the laws.

They are punishable . . ."

(xiv) Professional misconduct, Bus. & Prof. Code §6128

"Every attorney is guilty of a misdemeanor who either:

(a) Is guilty of any deceit or collusion or consents to any deceit or collusion with intent to deceive the court or any party. . . ."

8. MONETARY COMPENSATION

The state may provide monetary compensation to pardoned or innocent person who served part of a sentence. Penal Code Sections 4900-4906.

D. AVOIDANCE OF COLLATERAL ATTACK ON JUDGMENTS SUPPORTS ABSOLUTE IMMUNITY

Another cluster of interests which support judicial immunity are those relating to the prevention of collateral attacks on judicial proceedings by way of civil damage actions. The basic interest was nicely put by Lord Morris of Borth-Y-Gest in *Rondel* v. *Worsley* as follows:

> "A system which is devised so as to provide adequate and reasonable safeguards against the conviction of innocent persons and to provide for appeals must nevertheless aim at some measure of finality. If the system is found not to be adequate then it can be altered and modified: it can be kept continually under review. I cannot think, however, that it would be in the public interest to permit a sort of unseemly excrescence upon our legal system whereby someone who has been convicted and has, without success, exhausted all the procedures for appeal open to him should seek to establish his innocence (and to get damages) by asserting that he would not have been convicted at all but for the fact that his advocate failed to exercise due care and skill."

Rondel v. *Worsley, supra,* (1969) 1 A.C. at 250.

E. THE INTEREST IN MAINTAINING QUALITY PROSECUTORS IN THE FEARLESS DISCHARGE OF THEIR DUTIES SUPPORTS ABSOLUTE IMMUNITY

A legal realist might argue that the fear of suit is less significant currently since governmental entities have adopted schemes to provide for the representation and indemnification of employees acting within the scope of their employment.

It is true that Mr. Pachtman is being represented by the County Counsel pursuant to broad authority to represent county officers in civil actions. County Charter, Article VI, section 21. See also Government Code Section 825. The Code also provides a scheme for payment of judgments against employees where the public entity has provided the defense (Government Code Section 825) and for indemnification in other instances (Government Code §825.2).

However, it is not clear that the provisions relating to indemnification and payment of judgments apply to suits under the Civil Rights Act, which are not governed by and do not come within the scheme of the Tort Claims Act.[12]

Moreover, a public entity in California is not authorized to pay punitive damages. Government Code Section 825. And the Court of Appeals has held that

[12]A California appellate court opinion which has since been vacated and set for hearing in the California Supreme Court suggested that the Government Code provisions for payment of judgments and indemnification did not apply to actions under 42 U.S.C. §1983, whether or not brought in the state courts. *Williams v Horvath* (2d Dist. 1975) 45 Cal.App.3d 422.

punitive damages may be awarded under the Civil Rights Act. *Sostre* v. *McGinnis* (2d Cir. 1971) 442 F.2d 178, 205; *Caperci* v. *Huntoon* (1st. Cir. 1968) 397 F.2d 799, cert den. 393 U.S. 940 (1968); *Basista* v. *Weir* (3d Cir. 1965) 340 F.2d 74.

Finally, many prosecutors do not remain in public law as a career but go into private practice individually or with a firm. There are no provisions to compensate any such person for any loss of earnings he might suffer as a result of time spent in depositions or in trial or in completing interrogatories.

Consequently, a modern prosecutor still has good reason to fear the consequences of being embroiled in a civil damage action.

F. ABSOLUTE IMMUNITY DOES NOT BREED MISCONDUCT IN LIGHT OF THE OTHER RESTRAINTS ON PROSECUTORIAL ACTIONS

Nor do we believe that immunity from civil suit results in increased misconduct on the part of prosecutors, especially in light of the restraints listed on Table II. The statement of this Court with respect to the absolute privilege against defamation for official publications applies with equal vigor to this matter.

> "It seems to us wholly chimerical to suggest that what hangs in the balance here is the maintenance of high standards of conduct among those in the public service. To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional

instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good. And there are of course other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner."

Barr v. *Matteo, supra,* 3 L.Ed.2d at 1444, 360 U.S. at 576.

IV

THE WEIGHT OF CASE LAW SUPPORTS ABSOLUTE IMMUNITY UNDER THE CIVIL RIGHTS ACT FOR PROSECUTORIAL ACTS

A review of the Circuits in Appendix B shows that six circuits clearly hold for absolute immunity under the Civil Rights Act for actions taken within the prosecutional function and that one circuit, the Seventh, upon a careful study of the decisions so holds.

Only one circuit, the Sixth, seems to hold that immunity does not apply if the prosecutor acted maliciously. One circuit, the Fourth, has reserved the question. The position of another circuit, the Tenth, is unclear but the circuit's latest clear holding on the question supports an absolute immunity.

The prevailing rule has been stated as follows:

"Therefore, if the conduct charged is within the scope of a prosecutor's normal function, he is

cloaked with quasi-judicial immunity from civil liability under the Civil Rights Acts. (Citations)."

Tyler v. *Witkowski* (7th Cir. 1975) 511 F.2d 449, 450.

The prevailing view establishes an objective scope of immunity based on prosecutorial jurisdiction, akin to the rule governing judicial immunity.

". . . [W e] believe that both reason and precedent require that a prosecuting attorney should be granted the same immunity as is afforded members of the judiciary. The reasons are clear: his primary responsibility is essentially judicial—the prosecution of the guilty and the protection of the innocent, (Citation); his office is vested with a vast quantum of discretion which is necessary for the vindication of the public interest. In this respect, it is imperative that he enjoy the same freedom and independence of action as that which is accorded members of the bench. This reasoning is nearly as well established in Anglo American law as judicial immunity itself. (Citations)."

Bauers v. *Heisel* (3rd Cir. 1966) 361 F.2d 581, 590; accord: *Kauffman* v. *Moss* (3rd Cir. 1970) 420 F.2d 1270.

In a case where the state prosecutor was alleged to have suppressed information at trial, the Court held:

"Since we think that the facts alleged fall within acts that may be categorized as prosecutorial, rather than investigatory, functions, dismissal as to Moss [the prosecuting attorney] was proper. When

a prosecutor is acting within the scope of his proper prosecutorial capacity, these actions are cloaked with the same immunity granted to judges. (Citation).

We specifically reserve the question of the liability of a prosecutor acting within an investigatory capacity."

Barnes v. *Dorsey* (8th Cir. 1973)
480 F.2d 1057, 1060; accord *Duba* v. *McIntyre* (8th Cir. 1974) 501 F.2d 590, 592.

One of the most cited appellate decisions on prosecutorial immunity under the Civil Rights Act is the Ninth Circuit case of *Robichaud* v. *Ronan* (1965) 351 F.2d 533. That case approved the absolute immunity of prosecutors for prosecutorial acts but held that such absolute immunity did not apply to investigatory acts which were outside the prosecutorial function.

"Our court has held, in recent decisions, that a prosecuting attorney is immune from liability for damages under 42 U.S.C. §1983. Agnew v. Moody, supra; Harmon v. Superior Court, supra; Sires v. Cole, supra. The foundation of these opinions is that prosecuting attorneys, in acting as quasi-judicial officers, should enjoy the same immunity from civil liability as that which protects a judge. We adhere to our former opinions, but we cannot extend the doctrine of immunity beyond its purpose.

* * *

"The key to the immunity previously held to be protective to the prosecuting attorney is that the acts, alleged to have been wrongful, were committed by the officer in the performance of an integral part of the judicial process."

Robichaud v. Ronan, supra, 351 F.2d at 536

In an analysis cited with approval in all the decisions relied upon by Mr. Imbler, the Ninth Circuit defined an objective test for prosecutorial immunity.

"We believe, however, that when a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity -integral relationship between his acts and the judicial process-ceases to exist. If he acts in the role of a policeman, then why should he not be liable, as is the policeman, if, in so acting, he has deprived the plaintiff of rights, privileges, or immunities secured by the Federal Constitution and laws? (Citations) To us, it seems neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other."

Robichaud v. *Ronan, supra* 351 F.2d at 536-537; see *Hilliard* v. *Williams, supra,* 465 F.2d at 1217; *Hampton* v. *City of Chicago, supra,* 484 F.2d at 608 (quoted in full); *Holton v. Boman, supra,* 493 F.2d at 1178 (quoted in full); see also *Imbler* v. *Pachtman, supra,* 500 F.2d at 1302.

The *Hilliard* case, on the other hand, treats us to a parade of horribles gleaned from the pleadings (465 F.2d at 1214-1217), cites as authority a group of cases which recognize absolute immunity for prosecutors acting within the scope of their prosecutorial function (465 F.2d at 1217), and blandly concludes:

"We hold that factual averments of the complaint as summarized above, considered in a light most favorable to plaintiff, charge the District Attorney General with acts which were outside his quasi-judicial capacity and beyond the scope of 'duties constituting an integral part of the judicial process.' We are not willing to extend the doctrine of quasi-judicial immunity to a complaint charging deliberate suppression of an FBI laboratory report establishing the innocence of the defendant."

Hilliard v. Williams, supra, 465 F.2d at 1218.

No law, logic, or analysis of interests is offered to support this qualified prosecutorial immunity. Nor is there any definition of the scope of the immunity, though we may surmise that the court did not believe it extended to allegations of intentional misconduct of a serious nature at trial (assuming that the act of suppression occurred at trial).

But the inappropriateness of defining the scope of a prosecutor's quasi-judicial function by his alleged motivations has been analysed in depth by such scholars as Judge Learned Hand, who said:

"The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection

shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him."

Gregoire v. *Biddle* (2d Cir. 1949)
177 F.2d 579, 581

In the analogous situation of absolute immunity in defamation suits for acts taken in a judicial proceeding, Mr. Veeder summarized the policy analysis as follows:

"It may be urged, of course, that a false statement, known to be untrue, and dictated by malice, should always be the subject of a civil remedy. But this bald method of stating the question assumes both the untruth and the malice. If by any process of demonstration, free from the defects of human judgment, the untruth and malice could be set above and beyond all question or doubt, there might be ground for contending that the law should give damages to an injured person. But this is not the state of things under which this question of law has to be determined. Whether statements were in fact untrue, and whether they were dictated by malice, are, and always will be, open questions, upon which opinions may differ, and which can only be resolved by the exercise of human judgment. And the real question is whether it is proper on grounds of pub-

lic policy to remit such questions to the judgment of a jury. The reasons against doing so are simple and obvious. A participant in judicial proceedings may be utterly free from malice, and yet in the eyes of a jury be open to that imputation; or he may be cleared by the jury of the imputation, and may yet have to encounter the expense and distress of a harassing litigation. With such possibilities hanging over his head, he cannot be expected to speak with that free and open mind which the administration of justice demands."

Veeder, *Absolute Immunity in Defamation, supra,* at 470 (footnotes omitted.)

Hilliard did not address itself to these issues. The weight of the case law and the reasoning supporting quasi-judicial immunity require that prosecutorial immunity be absolute and unrelated to motivation within an objectively defined scope of prosecutorial duties.

V

AN OBJECTIVE PROSECUTORIAL FUNCTION CAN BE DEFINED

We have shown that an objective standard should be applied as most in keeping with persuasive precedent and with the interests served by the immunity. We now intend to show that an objective standard can in fact be defined.

A. THE OBJECTIVE STANDARD SHOULD BE BASED ON THE PRIMA FACIE NATURE OF THE FUNCTION AND ITS RELATION TO THE JUDICIAL PROCESS

It is beyond question that a prosecutor has many functions aside from the prosecutorial function, as a judge may have functions beyond his judicial function. *Ex Parte Virginia* (1879) 100 U.S. 339, 348, 25 L.Ed. 676, 680. The most common and significant functions of the district attorney are distinguished in Table III, below.

TABLE III

A SCHEMATIC BREAKDOWN OF THE VARIOUS FUNCTIONS OF THE DISTRICT ATTORNEY

District Attorney Functions	(1)	PROSECUTORIAL: QUASI-JUDICIAL Deciding whether to institute criminal proceedings, conduct of proceed-

ings, trial related investigations, etc. [See Table IV]

(2) EXECUTIVE

Actions as department head, e.g., demoting, or discharging staff members, ordering supplies.

(3) MINISTERIAL

Non-discretionary official acts, e.g., complying with court order to turn a particular item. See also Government Code Section 26503 (receipts), 26504 (accounting for money), Civil Code Section 1181 (taking acknowledgments).

(4) INVESTIGATORY

Actions relating to crime prevention or apprehension but not tied to a court proceeding, e.g., making or directing an arrest without a warrant or conducting a search.

(5) ADVISORY OR CIVIL LEGAL FUNCTIONS

Rendering general legal advice not directly connected to a criminal proceeding or performing civil legal functions. [In many California counties, the district attorney is the civil legal advisor for the County. Government Code Section 26520, et. seq. In the larger counties, including Los Angeles County, this function is assigned to the County Counsel. Government

Code Sections 26529, 27640, et. seq., Los Angeles County Charter Art. VI, §21. However, the district attorney continues to have certain civil functions, e.g., Government Code §26525 (collection of monies unlawfully spent), 26521 (collection of fines).]

(6) PUBLIC OFFICIAL

The district attorney is a leading public official and has duties and expectations flowing therefrom. For instance, various ordinances expect him to cooperate on matters involving the criminal justice system. For example, Los Angeles County Administrative Code Section 171 (cooperation with respect to bail bonds), 751 (member of commission on Judicial Procedures), 1034 (participation in Narcotics and Dangerous Drugs Commission), 1170 (cooperation with Delinquency and Crime Commission), 1616 (coordination with Human Services Department); see also Government Code §26500.5.

Outside Scope of Office —INDIVIDUAL ACTS

wholly outside objective scope of office, e.g., political campaigning, acceptance of a bribe.

Obviously, the core elements of a prosecutor's quasi-judicial duties are reviewing evidence to determine whether to institute criminal proceedings, filing charges, presenting evidence, and generally conducting the proceeding. See *Yaselli* v. *Goff, supra,* 12 F.2d 396. However, some practical fleshing out can be given to the concept by a review of the various statutes assigning quasi-judicial duties to the district attorney. The broad brush stroke outline of a district attorney's prosecutorial duties is displayed on Table IV below.

TABLE IV

THE PROSECUTORIAL FUNCTION: A FUNCTIONAL DEFINITION FROM THE STATUTES

1. INSTITUTING PROCEEDINGS FOR ARREST WARRANTS:

   "The district attorney shall institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses when he has information that such offenses have been committed . . ."
   Government Code §26501; see also Penal Code Section 980.

2. ADVISING GRAND JURY IN CRIMINAL MATTERS.

   ". . . [The district attorney] shall attend before and give advice to the grand jury whenever cases are presented to it for its consideration." Government Code §26501; see also Penal Code §§934, 935.

3. DRAWING INDICTMENT AND INFORMATION.

   "The district attorney shall draw all indictments and informations."
   Government Code §26502.

4. PROSECUTING ALL CRIMINAL ACTIONS, INCLUDING CONTROL OF COURT PROCEEDINGS ON BEHALF OF THE PROSECUTION.

   "The district attorney is the public prosecutor. He shall attend the courts and conduct on behalf of the people all prosecutions for public offenses."
   Government Code §26500; see Penal Code §619(5).

5. INCIDENTS OF CRIMINAL ACTIONS:
   - extradition, Penal Code §§1548.3, 1551.3, 1554.2
   - filing information, Penal Code §860
   - bail reduction, Penal Code §1289
   - subpoena witnesses, Penal Code §§939.2, 1326

6. TERMINATING CRIMINAL ACTIONS.

   "The court may, either of its own motion or upon the application of the prosecuting attorney, and in the furtherance of justice, order an action to be dismissed. . . ."
   Penal Code §1385.

7. STATEMENT OF VIEWS FOR USE OF DEPARTMENT OF CORRECTIONS.

   "Immediately after judgment has been pronounced, the judge and the district attorney, respectively, may cause to be filed with the

clerk of the court a brief statement of their views respecting the person convicted or sentenced and the crime committed. . . ."
Penal Code §1203.01.

8. ASSISTANCE ON CRIMINAL APPEALS.
"It shall be the duty of the district attorney to cooperate with and assist the attorney general in presenting all criminal matters on appeals."
Penal Code §1256.

9. FACTS AND RECOMMENDATION REGARDING PARDON.
"When an application is made to the Governor for pardon or commutation of sentence, or when an application has been referred to the Adult Authority, he or it may require the judge of the court . . . or the district attorney by whom the action was prosecuted, to furnish him or it, without delay, with a summarized statement of the facts proved on the trial, and of any other facts having reference to the propriety of granting or refusing said application, together with his recommendation for or against the granting of the same and his reason for such recomendation."
Penal Code §4803; see also Penal Code §4852.12.

10. PARTICIPATION IN JUVENILE PROCEEDINGS.
"In a juvenile court hearing, where the minor who is the subject of the hearing is represented by counsel, the district attorney shall, with the consent or at the request of the juvenile court judge, appear and participate in the hearing to assist in the ascertaining and presenting of the evidence. . . ."
Welfare and Institutions Code §681.

11. ENFORCING VARIOUS RESTRAINTS.
- injunction for false advertising, Business and Professions Code §17535.
- giving notice to abate nuisance, Penal Code §373(a)
- instituting civil or criminal actions to abate nuisance, Civil Code §§3491, 3494; Penal Code §§373(a), 11306; Code of Civil Procedure §731.

Each specific duty includes incidents necessary to the discharge of the duty. For example, conduct of a trial requires interviewing witnesses prior to putting on the People's case. In the analogous defamation immunity, the English courts have held:

> "It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must, as a necessary consequence involve that which is a step towards and is a part of the administration of justice—namely, the preliminary examination of witnesses to find out what they can prove."
>
> *Watson* v. *M'Ewan* (1905) A.C. 480, 487.

When a district attorney participates in investigations of crime where there is no pending criminal

proceeding, such might be viewed as an investigatory, rather than a prosecutorial, function. However, any trial attorney would agree that interviewing witnesses prior to trial and conducting further investigation to prepare for trial are normal actions of a trial counsel and consequently are part of the prosecutorial function. It was this type of investigation by Mr. Pachtman and the Adult Authority, after the trial but prior to the clemency hearing, which led eventually to Mr. Imbler's release. Surely, this type of investigation is uniquely prosecutorial, in the best sense of that word, implying an officer of justice and not merely an advocate, and should be accorded absolute quasi-judicial immunity.

The objective scope of absolute quasi-judicial immunity for prosecutorial acts should therefore include all actions which, without reference to motive, are within the normal scope of a prosecutor's quasi-judicial duties and are prima facie in accordance with those duties. A prosecutor's quasi-judicial duties include those listed on Table IV and the incidents thereof. In general, quasi-judicial functions can be summarized as those instituting judicial proceedings, advising or presenting charges to a grand jury, drawing or filing court pleadings, the conduct of criminal proceedings, and all official statements or assistance with respect to sentencing, pardon, or clemency.

B. UTILIZING A HABEAS CORPUS PROCEEDING AS AN OBJECTIVE STANDARD OF IMMUNITY DOES VIOLENCE TO THE INTERESTS SUPPORTING THE IMMUNITY AND TO THE GREAT WRIT ITSELF

Any attempt to burden the writ of habeas corpus with unrelated civil side effects should be viewed with great suspicion. The habeas corpus proceeding is designed to test the lawfulness of government custody of an individual. *Townsend* v. *Sain* (1963) 372 U.S. 293, 311, 9 L.Ed.2d 770, 784, 83 S.Ct. 754. It is not designed to assign blame among officers of the government.[13]

Mr. Pachtman, was not represented at the habeas corpus proceeding before Judge Ferguson, (A. 30), nor would the government officer accused of wrongdoing normally be represented. Since the issue is the lawfulness of custody, only the person having custody, in this case the warden, was represented (A. 30).

If the habeas corpus proceeding were to be a determinant of civil liability or of immunity, the government officers accused of misconduct would naturally wish to appear and possibly even to intervene. The district attorney as a county official would be represented by the County Counsel, city police would be represented by the City Attorney, while the Attorney

[13]"If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immedate or speedy release - the traditional purpose of habeas corpus." *Preiser* v. *Rodriguez* (1973) 411 U.S. 475, 494, 36 L.Ed.2d 439, 453, 93 S.Ct. 1827.

General would represent any accused state officials. The result would truly be an unseemly excrescence on the writ proceeding, leading to questions and evidence designed to protect against civil liability rather than to the expeditious resolution of the lawfulness of custody.

Moreover, the determinant would be irrational because it would be random. Those acquited or otherwise not in custody would not be able to win a favorable habeas corpus ruling.

The outcome of a habeas corpus proceeding, therefore, would be a totally inappropriate screening device to test the immunity of prosecutors. It would be unfair to the prosecutors who are not represented at the proceeding. It would be unfair to those ineligible to maintain a habeas corpus proceeding. But most significantly, it would warp the purpose of the Great Writ.

VI

RESPONDENT PACHTMAN IS ENTITLED TO ABSOLUTE IMMUNITY FOR THE CLAIMS PRESENTED

Petitioner's claims amount to allegations that: (1) Mr. Pachtman intentionally asked incomplete or misleading questions of certain prosecution witnesses during the course of the trial; (2) that knowing the truth, Mr. Pachtman failed to correct false testimony during the trial; and (3) that Mr. Pachtman asked certain police officers who came to the courtroom to arrest a prosecution witness, to refrain from arresting the witness until his testimony at the trial had been completed.

See *Brief of Petitioner,* pages 6-8. All of these acts pertain directly to the conduct of the prosecution's case and are at the heart of the prosecutorial function.[14] If there is to be absolute immunity for prosecutorial acts at all, it must cover these claims.

The Courts have repeatedly held that the questioning of witnesses and the introduction of evidence at trial are actions within the protected prosecutorial function, regardless of claims of knowing use of perjured or fradulent testimony or evidence, or the alleged violation of the right against self incrimination. *Kauffman* v. *Moss* (3rd Cir. 1970) 420 F.2d 1270, *United States ex. rel. Moore* v. *Koelzer* (3rd Cir. 1972) 457 F.2d 892; *Barnes* v. *Dorsey* (8th Cir. 1973) 480 F.2d 1057; *Berg v. Cwiklinski* (7th Cir. 1969) 416 F.2d 929; *Ney* v. *State of California* (9th Cir. 1971) 439 F.2d 1285, *Imbler* v. *Pachtman* (9th Cir. 1974) 500 F.2d 1301, *Kostal* v. *Stoner* (10th Cir. 1961) 292 F.2d 492; see also *Yaselli* v. *Goff, supra,* 12 F.2d 396.

Nor is it unfair that Mr. Pachtman should be immune from damages under the Civil Rights Act for such claims. Mr. Imbler's counsel, a deputy public defender, could have corrected any of the "false" testimony presented at Mr. Imbler's trial.

> "Respondent's position is that any errors, allegedly committed by the prosecution could have been cured by action of defense counsel . . . It is clear

[14]The Ninth Circuit held these activities to be an "integral part of the judicial process." *Imbler* v. *Pachtman, supra,* 500 F.2d at 1302. (A. 117)

that defendant's public defender should have done so.'"[15] Ferguson, J. *Imbler* v. *Craven, supra,* A. 53-54; see also A. 22.

But if any damage action were filed against the public defender under the Act for violation of the right to (competent) counsel,[16] the public defender could defend on the grounds that he either was not acting under color of state law or was entitled to quasi-judicial immunity. *John* v. *Hurt* (7th Cir. 1973) 489 F.2d 786; *Brown* v. *Joseph* (3rd Cir. 1972) 463 F.2d 1046; *French* v. *Corrigan* (7th Cir. 1970) 432 F.2d 1211, cert. den. 401 U.S. 915. Had Mr. Imbler been represented by a private counsel, such as Mr. Hanson, no Civil Rights Act claim could have been stated against counsel since he would not have been acting under color of state law. See *Lefcourt* v. *Legal Aid Society* (2nd Cir. 1971) 445 F.2d 1150; *Steward* v. *Meeker* (3rd Cir. 1972) 459 F.2d 669.

A persuasive argument that immunity rather than liability under the Civil Rights Act for counsel most promotes justice was made in an action in which a Public Defender was sued under the Act and asserted and was accorded quasi-judicial immunity. The Court said:

> "Moreover, as stated in the Public Defender's brief, 'the most probable result of such a decision [liability under the Civil Rights Act] would be the exact opposite of what the courts want. Both

[15]Judge Ferguson thus under Mr. Imbler's theory laid the foundation for a civil suit against the public defender, who like Mr. Pachtman, was not represented at the habeas corpus proceeding.

[16]The claim was raised in the state habeas corpus proceeding A.28.

> the Court and the Public Defender's Office [seek] adequate representation of defendants in criminal proceedings, as well as the [expeditious] handling of cases. However, if a civil rights suit from unsatisfied clients is a constant threat to the Attorney involved, then there would be a chilling effect upon Defense Counsel's tactics. Defense Counsel would be caught in an intrinsic conflict of protecting himself and protecting his client.' "
>
> *Brown* v. *Joseph* (3rd Cir. 1972) 463 F.2d 1046, 1049.

Similarly, the prosecutor would be confronted with an intrinsic conflict between representing the People and protecting himself. In addition, the prosecutor has an obligation to do justice.

> "The prosecutor's objective is justice; his role is not that of a mere advocate."
>
> *Imbler* v. *Craven, supra,* A. 53.[17]

There would be a conflict between the prosecutor's duty to do justice by revealing flaws in his case and his interest in protecting himself from civil liability. Certainly, the prosecutor's duties to the People and to justice outweigh a private claimant's right to civil compensation. The law should not expect heroic action as a norm. Therefore, civil liability should not be created

[17]See also A.B.A. Code of Professional Responsibility, E.C. 7-13 "[The public prosecutor's] duty is to seek justice, not merely to convict" and In re Ferguson (1971) 5 Cal.3d 525, 487 P.2d 1234.

which might cause conflict with the Prosecutor's overriding duties to the People and to justice.[18]

Moreover, the futility of determining whether the alleged "false" testimony injured Mr. Imbler, and if so to what extent, is demonstrated in this case. Would the 1961 trial jury have been swayed by the fact that witness Costello had been involuntarily rather than voluntarily committed to a mental institution? A general instruction on mental disease was given, to which that issue is irrelevant. See Attachment C, being Instruction 36 in the trial of *People* v. *Imbler,* L.A. Crim. 240, 368, of which we ask this Court to take judicial notice. Would the trial jury have been influenced by the fact that witness Costello was convicted of more than the one felony to which he admitted? An instruction on conviction of a felony was given, to which multiple convictions are irrelevant. See Attachment D, being Instruction 35, in the trial of *People* v. *Imbler, supra.* To call upon a civil jury to decide in 1975 the impact a particular question or inference had on a criminal jury trial in 1961 strains the judicial process beyond all reason.[19]

[18]Compare: "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself." *Bradley* v. *Fisher, supra,* 80 U.S. at 347, 20 L.Ed. at 649.

[19]Lord Pearce commented in Rondel v. Worsley, *supra,* 1 A.C. at 255 that: "When counsel wishes on reflection at the end of a case that he had asked a question or called a witness or (about equally often) that he had *not* asked that question or called that witness, it may well be that the thing, which he now wishes otherwise, helped rather than hindered his case in the minds of the jury, if the truth could be known, which it cannot." Lord Morris said: " A trial upon a trial would raise speculation upon speculation." Id. at 250.

Petitioner argues that at least the act of asking the police to refrain from arresting a prosecution witness until his testimony was complete was outside the prosecutorial function. *Brief of Petitioner* at page 50-53. Petitioner supports this contention with cases holding that where a prosecutor participates in an arrest or search he is acting in an investigatory capacity. The comparison is completely fallacious. There is no police or investigatory role in asking a witness not be arrested or taken from the Court prior to testimony. It is a normal role of counsel to provide for the presence of his witness at the court and to preserve the continuity of his case. In any event, what federally protected right is violated by asking that a witness not be arrested until his testimony is complete? The claim is frivolous.

The charges made against Mr. Pachtman relate to acts clearly within the scope of the quasi-judicial function of a prosecutor and consequently absolute immunity from damage suits, akin to judicial immunity, should apply.

VII

CONCLUSION

A prosecutor in acting within his properly defined prosecutorial function is an indispensable part of the judicial process. Unlike an executive, he is subject to constant review and supervision by the judiciary of his quasi-judicial acts. In filing charges or arguing for conviction or for a particular disposition, he is akin to a probation officer recommending disposition, for whom the law accords an absolute quasi-judicial immunity. *Burkes* v. *Callion* (9th Cir. 1970) 433 F.2d 318.

The determinant of both legislative and judicial immunity is whether the act was taken within an objectively defined scope of jurisdiction. Likewise, the criterion for absolute immunity for defamation is whether the protected act took place within the objectively defined course of a judicial proceeding.

The interests supporting judicial immunity apply with equal vigor to prosecutorial immunity and equally demand absolute immunity. The interests supporting absolute immunity in defamation require that acts of counsel in the course of a judicial proceeding be protected.

The term "qualified immunity" has never been satisfactorily defined. However, if it means that the immunity applies only in the absence of malice, the immunity would be a mere defense of good faith, except against the most inartful pleaders who fail to allege malice.

But a good faith defense does not satisfy the interests supporting quasi-judicial immunity. Those interests require protection against the harassment and cost of litigation, the uncertainty of a verdict as to motive, and the inappropriateness of relitigating in the civil forum the impact of a particular act on a criminal trial.

Mr. Pachtman acted not only defensibly, but nobly, in the prosecution of Mr. Imbler. Mr. Pachtman did not close the books on Mr. Imbler after a conviction was obtained and affirmed. Instead, pursuing leads from the Adult Authority, he reinstituted an investigation and transmitted information (Appendix A) harmful to the prosecution's case to the Governor. Petitioner and his counsel, ironically protected by absolute defamation immunity, now (perhaps maliciously) hurl at Mr. Pachtman brickbrat allegations of the knowing use of *"perjured"* testimony, *Brief of Petitioner,* p. 20 (which the California Supreme Court found did not occur, *In re Imbler,* 60 Cal.2d 554; even Judge Ferguson did not find that perjury occurred, see A. 36 and 42). Safely behind their shield of absolute defamation immunity, petitioner and his counsel argue against absolute immunity for prosecutorial acts.

But just as the injury to Mr. Pachtman by defamation in the course of this action is outweighed by the interest in protecting free speech in the course of ju-

dicial proceedings, so the rare injury from prosecutorial misconduct is outweighed by the public interest in protecting the fearless discharge of a prosecutor's duties as advocate of the People and an officer of justice.

For these reasons, the decision of the Ninth Circuit in *Imbler* v. *Pachtman* (1974) 500 F.2d 1301 should be affirmed.

Respectfully submitted,

JOHN H. LARSON,
County Counsel
County of Los Angeles

By JOHN P. FARRELL,
Deputy County Counsel
Attorneys for Respondent Pachtman

APPENDIX

APPENDIX "A"

August 17, 1962

Honorable Edmund J. Brown
Governor, State of California
Capitol Building
Sacramento, California
Attention: Mr. Arthur L. Alarcon, Executive Secretary to the Governor

Dear Sir:

In re Paul Kern Imbler
Adult Authority No. A-48622
S. C. No. 240368

On July 25, 1962, I wrote Mr. C. E. Halderman of the Adult Authority expressing my views pertaining to the above mentioned case. Inasmuch as your office has all of the documents involved, I am writing directly to advise that in my opinion there is now additional evidence that could be important on the issue of the innocence of Mr. Imbler.

This additional evidence relates to two separate portions of the case: the first pertains to an association between Mr. Imbler and a Mr. Lingo and the second to the alibi of Mr. Imbler. This letter will discuss these matters in the order in which they became known.

As the record in this case reflects, evidence of an association between Imbler and Lingo was proven to have existed at the time of an attempted robbery in Pomona, during the course of which Lingo was killed.

This subsequent association on January 14, 1961, was important toward showing an association at the time of the murder on January 4, 1961 [because Lingo was identified as having been a participant in the January 4 murder].

The defense on this point was to the effect that there was no such continuing association as Imbler had only met Lingo immediately prior to the robbery attempt on January 14, 1961. A man described only as "Dale" was supposed to have made the introduction.

Mr. James Biddle, special investigator for the Adult Authority, contacted me on July 30, 1962, and advised that he had contacted a Dale Kemp, who corroborated this defense contention. I felt that in all fairness to Imbler and in the interest of justice this should be completely investigated and accordingly interviewed and took sworn statements from Dale Kemp and Lambert Fontenot. Both statements have been submitted to the Adult Authority and, as a perusal of them will show, they do corroborate Imbler in his contention, as well as the testimony of Jerry Mayes, a participant in the Pomona robbery, as given at the trial. Three statements on different dates were taken from Mayes. In the first he contradicted his trial testimony but in subsequent statements backtracked. At first, he denied knowing Kemp and Fontenot and in particular denied any meeting with them prior to January 14, 1961. In the later statements, he equivocated on this point and what the sum and substance of his statements can be is not clear to me.

Due to the facts that Kemp and Fontenot were ex-convicts, had been at the Chino State Prison with Imbler in the past, and that Imbler didn't name them at the trial, details in their statements were incomplete or did not agree, and part of their statements did not hold up under investigation, I believed them to be of recent manufacture and discounted them. In any event, on August 14 due to finding a corroborating witness of sorts of Imbler's alibi, I re-examined the statements as well as other facts and noted the following: (1) prior to trial [but unknown to the prosecution] Imbler did notify the Public Defender investigator of two men who participated in his introduction to Lingo and stated to the investigator that due to the fact that they were ex-convicts on parole he would rather not reveal their identity unless necessary; (2) the defense attorney himself decided not to present this matter by having this information give to the jury at the trial; (3) at the trial [page 652 of the transcript] Imbler did attempt to give the background of the meeting with Kemp which he claimed led to Kemp's introduction of Lingo to him, but was stopped by an objection and no offer of proof was made by the defense showing the materiality or relevancy. Kemp, Fontenot and Mayes do not tell the true and complete story and there is a strong possibility that what they have told was fabricated prior to the trial. Yet, if this is the case, the question arises as to why, then, wasn't this evidence utilized at the trial. To answer this question, only specula-

tion is possible. In any event, investigation has revealed a consistency in Imbler's position which is now corroborated by others.

The second item of additional evidence relates to Imbler's alibi. He testified he was elsewhere at the time of the murder with "Robert Mahon, Jerry Mayes, and three other men that were friends of Jerry Mayes, one man that he worked with, perhaps the other too" [page 459 of the transcript]. He then testified that he thought the first name of one of these men was George. He further claimed that they made a round of bars in a 1955 Buick belonging to one of the friends of Jerry Mayes. On the other hand, Jerry Mayes, in his testimony, while acknowledging the use of a 1955 Buick, claimed he did not know the names of any of the persons present.

Two men, one named George Koenig and answering the description given by Imbler in his testimony, were found by Mr. Biddle to be working where Mayes had been employed in January of 1961. Their sworn statements are being submitted. George, who was an ex-convict, denies any support of the alibi. Joe Scoffinger, owner of a 1955 Buick in January, 1961, claims he did make the rounds described by Imbler in his testimony, but can't state the date other than as being around the New Year's weekend.

The finding of these witnesses is not conclusive evidence that Imbler is not the murdered. Here again, many possibilties can be speculated. Imbler could have been in the company he claims, but on a different night than that of the murder, and he could be hoping that the inconclusiveness of witnesses as to the date they were in his presence would work to his benefit. It is also possible that Joseph Scoffinger is a manufactured witness. On the other hand, there is again consistency by Imbler, and it seems that Scoffinger could have been located by the defense, and his testimony to the jury could have been taken for whatever its worth.

A third factor in this case that should in all fairness be called to your attention is the recently determined background of the People's principal witness, Mr. Alfred Costello. It has just been discovered that Mr. Costello is not a professional man, nor does he have a college degree. He has several convictions involving checks and presently is in the County Jail awaiting trial on another such charge. He has a history of ingratiating himself with the various law enforcement agencies and provides them with information. He manages to turn this situation to his advantage when he gets into difficulty. Needless to say, these matters were not known to me at the time of the trial, nor do I know what effect it would have had if it had been known. Mr. Costello did appear honest and forthright in his testimony and successfully stood up under rigorous cross examination.

I want to make clear that this office presented all the facts we had available to the jury, the defendant had a fair trial, and the verdict of the jury was certainly consistent with the evidence. I am not at all

convinced that the defendant is innocent of this charge, but I do believe, as does the District Attorney's Office, that a prosecuting attorney has a duty to be fair and see that all true facts, whether helpful to the case or not, should be presented. To fail in this duty would result in a miscarriage of justice and weaken our judicial system. In fulfilling my duty, I am conveying this information to you. If I can be of any further assistance in this case, please notify me.

Very truly yours,

WILLIAM B. McKESSON
District Attorney

By
RICHARD E. PACHTMAN
Deputy District Attorney

REP: pln

[Note: brackets in original]

APPENDIX "B"

I. CIRCUITS HOLDING PROSECUTOR ABSOLUTELY IMMUNE FOR DAMAGES UNDER THE CIVIL RIGHTS ACT FOR ACTIONS WITHIN SCOPE OF PROSECUTORIAL FUNCTION

CIRCUIT	LEADING CASES	COMMENT
1st	Guerro v. Mulhearn (1974)[a] 498 F.2d 1249	[a]But obtaining search warrant or wiretap order not deemed within prosecutorial function.
2nd	Dacey v. New York County Lawyers Ass'n.[b] (1969) 423 F.2d 188, cert. den. 90 S.Ct. 1819, Fanale v. Sheehy (1967) 385 F.2d 866	[b]But suppression of book by Bar Ass'n. as unlawful practice of law not included within absolute immunity.
3rd	Kauffman v. Moss (1970) 420 F.2d 1270; Bauers v. Heisel (1966) 361 F.2d 581, cert. den. 386 U.S. 1021, approved in Johnson v. Alldredge (1973) 488 F.2d 820, 827, cert. den. ____ U.S. ____.	

5th	Guerrero v. Barlow (1974) 494 F.2d 1190; Brazzel v. Adams (1974) 493 F.2d 489	
7th	Tyler v. Witkowski (1975) 511 F.2d 449; Holton v. Boman (1974) 493 F.2d 1176;[e] John v. Hurt (1973) 489 F.2d 786;[f] Hampton v. City of Chicago (1973) 484 F.2d 602, cert. den. 415 U.S. 917; Berg v. Cwiklinski (1969) 416 F.2d 929; Arensman v. Brown (1970) 430 F.2d 190	[e]*Holton* though fuzzily written holds no more than that a prosecutor is not immune for acts outside his prosecutorial function. [f]*John* speaks of an undefined "qualified immunity" for prosecutors citing cases which qualify the immunity to the scope of the prosecutorial function.
8th	Duba v. McIntyre (1974) 501 F.2d 590 U.S. App. Pend., Barnes v. Dorsey (1973) 480 F.2d 1057, Wilhelm v. Turner (1970) 431 F.2d 177	
9th	Imbler v. Pachtman (1974) 500 F.2d 1301, Robichaud v. Ronan (1965) 351 F.2d 533	

II. CIRCUITS HOLDING A PROSECUTOR IS LIABLE FOR DAMAGES UNDER THE CIVIL RIGHTS ACT FOR ACTIONS WITHIN PROSECUTORIAL FUNCTION IF MALICIOUS

CIRCUIT	LEADING CASES	COMMENT
6th	Hilliard v. Williams (1972) 465 F.2d 1212, cert. den. 409 U.S. 1029	

III. CIRCUITS WHERE IMMUNITY FOR ALLEGEDLY MALICIOUS ACTS IS IN SOME DOUBT

CIRCUIT	LEADING CASES	COMMENT
4th	Weathers v. Ebert (1974)[c] 505 F.2d 514, U.S. App. Pend., McCray v. State of Maryland (1972)[d] 456 F.2d 1.	[c]The *Hilliard* case was noted and the question of absolute immunity for intentional misuse of prosecutorial power was reserved; but held that prosecutor was absolutely immune for negligent or reckless behavior.
10th	Valdez v. Black (1971)[e] 446 F.2d 1071	[d]This earlier case reaffirmed the rule that prosecutors are absolutely immune for acts within the prosecutorial function. [e]Valdez upheld a defense verdict rendered despite jury instructions based on a qualified immunity; the Court of Appeals therefore did not have to decide whether a qualified or absolute immunity applied.
	Kostal v. Stoner (1961)[f] 292 F.2d 492	[f]Kostal contemplates an absolute immunity.

APPENDIX "C"

INSTRUCTION NO. 36

The fact that a witness has suffered mental disease or mental derangement of the type termed insanity, if such be a fact, may be considered by you in judging whether that condition affected the witness's power of perception or observation at the time of which he testified or whether that condition affected his ability to recollect or remember the facts to which he testified or his ability to narrate those facts while testifying in this trial.

The fact of such insanity does not necessarily destroy or impair the witness's credibility, and it does not raise a presumption that the witness has testified falsely. It is simply one of the circumstances that you may take into consideration in weighing the testimony of such a witness.

People v. LaRue, 62 C.A. 76
People v. Bell. 138 C.A. 2d 7
Witmore on Evidence, 3rd Edition, Section 932

APPENDIX "D"

INSTRUCTION NO. 35

CONVICTION OF A FELONY

The fact that a witness had been convicted of a felony, may be considered by you [for only one purpose, namely,] in judging the credibility of that witness. The fact of such a conviction does not necessarily destroy or impair the witness's credibility, and it does not raise a presumption that the witness has testified falsely. It is simply one of the circumstances that you are to take into consideration in weighing the testimony of such a witness.

APPENDIX "E"

LOS ANGELES COUNTY CHARTER AND ORDINANCE PROVISIONS CITED

1. LOS ANGELES COUNTY CHARTER

Article IV, Section 12

The elective County officers other than members of the Board of Supervisors shall be: Sheriff, District Attorney and Assessor.

Article VI, Section 21

The County Counsel shall represent and advise the Board of Supervisors and all County, township and school district officers, in all matters and questions of law pertaining to their duties, and shall have exclusive charge and control of all civil actions and proceedings in which the County, or any officer thereof, is concerned or is a party. He shall also act as attorney for the Public Administrator in the matter of all estates in which such office is executor, administrator with the will annexed, or administrator, and the County Counsel shall, in every such matter, collect the attorney's fees allowed therein by law and pay the same into the County Treasury.

Article IX, Section 34 (13)

The Commission shall prescribe, amend and enforce rules for the classified service, which shall have the force and effect of law, shall keep min-

utes of its proceedings and records of its examinations and shall, as a Board or through a single Commissioner, make investigations concerning the enforcement and effect of this Article and of the rules and efficiency of the service. It shall make an annual report to the Board of Supervisors.

The rules shall provide:

. . .

(13) For the discharge or reduction in rank or compensation after appointment or promotion is complete, by delivering to the person discharged or reduced a notice of such discharge or reduction stating the effective date thereof and the reasons for such discharge or reduction. Such reasons shall state the specific grounds and the particular facts upon which the discharge or reduction is based, and the discharged or reduced employee shall be allowed a reasonable time in which to reply thereto in writing. Both the reasons and the reply must be filed with the Commission, whereupon if the discharged or reduced employee shall so request, the Commission shall set a hearing. Such a hearing may be before one or more members of the Commission or a hearing board or officer appointed by the Commission. If such hearing is not before the full Commission, findings shall be submitted to the Commission for its approval. If the Commission accepts such findings it need not read the record of the hearing; if it declines to accept such findings,

it must read the record or hold a hearing *de novo*. If the Commission concludes that the reasons are not sufficient to justify such discharge or reduction, it shall so notify the appointing authority concerned and the discharged or reduced employee automatically shall be reinstated retroactively to his position as of a date specified by the Commission pursuant to its rules. If the Commission finds that the discharge or reduced employee was without fault or delinquency, he shall be reinstated as of the date of his discharge or reduction.

Article XI, Section 50 [in part, excluding procedures for recall]

"The holder of any elective or appointive county or township office may be recalled by the electors at any time after he has held his office six months. . . ."

2. LOS ANGELES COUNTY ADMINISTRATIVE CODE

(Ordinance No. 4099)

Section 171.

"It shall be the duty of the District Attorney to cooperate with the Superior, Municipal and other courts in the County of Los Angeles, and the County Counsel and all other officers concerned with the acceptance, approval, release and forfeiture of bail bonds. He shall, so far as consistent with law, assist in the enforcement of any

rules adopted by the Superior or Municipal Courts in this County, with respect to bail, and perform any duties delegated to him thereby.

"He shall keep a calendar which shall show the names of all defendants released on bail, the date of such release, by whom ordered, and when and where the defendant is required to appear, the name and addresses of the sureties and the amount of the bail. The calendar shall also show the date of any order of forfeiture or exoneration of any bail, by whom ordered, the date of notification to the County Counsel of any fortfeiture, and any other matter or thing which may be necessary to show a complete record of all actions taken with regard to bail.

"It shall be the duty of the District Attorney to notify the County Counsel of any forfeiture of bail, and to furnish the County Counsel with a complete record of all facts necessary to enable the County Counsel to maintain an action on any forfeited bail bond, including certified copies of minute entries and court dockets, and if the bail forfeited be cash or its equivalent, the District Attorney shall notify the officer having custody of such cash or its equivalent of the fact and date of forfeiture and by whom made. The County Auditor shall be given the same notification at the same time as the County Counsel or other officer.

"The District Attorney shall also notify the sureties on any forfeited bond of the fact of forfeiture by mail directed to the address given by the surety."

Section 751

"The Commission on Judicial Procedures is hereby continued. All references in this article to the "Commission" shall be deemed a reference to the Commission on Judicial Procedure. The Commission shall consist of:

(a) The following ex officio members:

(1) The Presiding Judge of the Superior Court of the County.

(2) The Presiding Judge of the Municipal Court of the Los Angeles Judicial District.

(3) The President of the Los Angeles County Municipal Judges Association.

(4) The District Attorney.

(5) The Public Defender.

(b) Ten members appointed by the Board."

Section 1034

"The District Attorney, Sheriff, and County Counsel each shall appoint one representative from his department to attend and participate in the meetings of the [Narcotics and Dangerous Drugs] Commission without a vote."

Section 1170

"The Board hereby directs and requests the Department of Community Services, County Counsel, District Attorney, Probation Officer, and the Sheriff, and all other County officers to aid and

cooperate in every way with the [Delinquency and Crime] Commission."

Section 1616 (a)

"The Sheriff, the District Attorney, the officers and employees listed in Section 1614, and all other county officers and employees whose qualifications enable them to do so shall coordinate with the Director [of Human Services] on the development and implementation of plans for county-wide programs to reduce delinquency and recidivism and for other county-wide programs of human services for juveniles and adults."

Supreme Court, U. S.
FILED
JUN 30 1975
MICHAEL RODAK, JR., CLERK

No. 74-5435

In the Supreme Court of the United States

OCTOBER TERM, 1974

PAUL KERN IMBLER, PETITIONER

v.

RICHARD PACHTMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
JOHN C. KEENEY,
Acting Assistant Attorney General,
DANIEL M. FRIEDMAN,
Deputy Solicitor General,
HARRY R. SACHSE,
Assistant to the Solicitor General,
JEROME M. FEIT,
ROBERT M. PEARCE,
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Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5435

PAUL KERN IMBLER, PETITIONER

v.

RICHARD PACHTMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

The United States will discuss the following question:

Whether prosecutors are immune from civil liability for damages for acts done as part of their official duties.

INTEREST OF THE UNITED STATES

This is an action for damages under the Civil Rights Act (42 U.S.C. 1983) against a state prosecuting attorney, based on the claim that the prosecutor knowingly used perjured testimony to convict the plaintiff of murder. The court of appeals affirmed the district court's dismissal of the complaint, ruling that the prosecutor had absolute immunity from civil

liability for acts done in the performance of his official duties.

Although federal law governs the immunity of federal prosecutors (cf. *Howard* v. *Lyons*, 360 U.S. 593, 597), the Court's decision on the scope of the common-law immunity of a state prosecutor is likely to have a significant impact upon, and perhaps may control, the immunity of federal prosecutors. The United States thus has a substantial interest in the resolution of the immunity issue. For the reasons discussed below, we believe that the prosecutor has absolute immunity for acts done as part of the performance of his duties.[1]

STATEMENT

This suit for damages grows out of petitioner's 1961 conviction in the California courts of first-degree murder and assault with a deadly weapon with intent to commit murder. The Supreme Court of California twice upheld petitioner's conviction, but the federal courts then set aside the conviction in a *habeas corpus* proceeding, ruling that the conviction had been obtained through the use of perjured testimony. The petitioner then brought the present suit for damages in the United States District Court for the Central District of California, against respondent Pachtman, the Deputy District Attorney who had prosecuted the

[1] The present suit for damages is brought under 42 U.S.C. 1983. Since that provision, "at least facially", is inapplicable to federal officials (see *District of Columbia* v. *Carter*, 409 U.S. 418, 424–425), we do not discuss the additional question whether, if the prosecutor has such immunity, Congress modified or eliminated it in Section 1983. Cf. *Pierson* v. *Ray*, 386 U.S. 547, 554.

criminal case in the state court. The district court dismissed the complaint and a divided court of appeals affirmed, ruling that respondent was immune from liability for damages for acts done as part of his official duties as a prosecuting attorney.

1. *The murder conviction.* The evidence in the state prosecution[2] shows that on the evening of January 4, 1961, two men entered a Los Angeles grocery store and one of them shot and killed the owner. The victim's wife could not identify the murderer, but identified the other man, who was killed 10 days after the shooting during an armed robbery in which he accompanied petitioner. The victim's wife, however, identified the hat and coat the murderer wore. The coat, which contained the murder weapon and a razor and case, was found in an alley near the store where, according to the witness Costello, petitioner had dropped it after Costello chased petitioner.

Three witnesses identified petitioner. Costello, who was walking on the opposite side of the street, crossed the street when he heard a shot and saw petitioner, who was still wearing his hat and coat and carrying a gun, in a lighted area in front of the store. Costello stated that petitioner turned into an alley, dropped his hat, began to run and that Costello chased him. When petitioner paused, Costello could see him without his hat at a distance of between 15 and 20 feet. Petitioner fired at Costello, discarded his coat and fled through a parking lot. Costello retrieved the coat.

[2] The evidence is summarized in the opinions of the Supreme Court of California upholding petitioner's conviction (App. 8–16).

Alonzo Dunlap, an attendant at the parking lot, testified that he got a side and front view of petitioner as he walked through the illuminated lot. Billy Hillen saw petitioner and the other man enter the store as he was leaving it, and, after he heard the shot, he saw the two men leaving the store with petitioner holding a gun.[3]

Petitioner's defense was an alibi; he also extensively cross-examined the prosecution's witnesses.

On direct appeal, the Supreme Court of California, in an opinion by Justice Traynor, unanimously upheld the conviction. *People* v. *Imbler,* 57 Cal. 2d 711, 21 Cal. Rptr. 568, 371 P. 2d 304 (App. 8–14). Subsequently, petitioner sought in the Supreme Court of California a reopening of his case, alleging that "the prosecution secured petitioner's conviction through the knowing use of perjured testimony and that newly discovered evidence completely undermines the entire structure of the case on which the prosecution was based" (App. 15–16). After an evidentiary hearing conducted by Thomas P. White, a retired Associate Justice of that court acting as a referee, the Supreme Court of California, in a lengthy opinion by Justice Traynor, again unanimously upheld petitioner's conviction (App. 14–29).

The court held that most of petitioner's allegations that Costello had testified falsely had not been established (App. 16–21); that there was no showing that

[3] A fourth person, James Fritz, stood near Hillen when the latter saw the two men leave the store. Fritz, however, did not testify and the police apparently were unable to locate him at the time of trial (App. 25).

representatives of the state were aware of the falsity of statements by Costello concerning his college degrees (App. 21–22); that the fingerprint expert had not knowingly testified falsely and that, if the expert had acted negligently in analyzing the fingerprints on the razor case and testifying about them, such negligence did not deny petitioner a fair trial (App. 23–25). The court also rejected petitioner's contention that the state had suppressed evidence favorable to him (App. 25–26). Finally, it ruled that the new evidence upon which petitioner relied did not warrant a new trial (App. 26–28).

2. *The habeas corpus proceeding.* Following further state proceedings which resulted in vacation of petitioner's death sentence and a resentencing to life imprisonment (App. 31), petitioner instituted a *habeas corpus* proceeding in the United States District Court. That action raised the same contentions concerning allegedly false testimony and new evidence that the Supreme Court of California had rejected (App. 30–32). For that reason, the district court did not conduct a further hearing but decided the issue upon the record before the California courts, including the trial record and the record before Justice White (App. 32). The district court issued the writ, holding that "petitioner was denied a fair trial, and that his federally protected right to due process of law was thereby violated" (App. 60).

The court held that Costello had testified falsely at petitioner's trial with respect to six matters (App. 42–43); that, "as to each of the six items of false testimony described above, the court finds that the

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prosecutor had knowledge of such falsity, or, if he did not have actual knowledge, that he had reason to believe such testimony was false and his reckless use thereof in disregard of such reason is to be treated the same as knowing use of false testimony" (App. 53); and that fingerprint evidence and evidence relating to the overcoat worn by the killer was suppressed (App. 54–58). The court of appeals affirmed *per curiam*. *Imbler* v. *State of California*, 424 F. 2d 631 (C.A. 9), certiorari denied, 400 U.S. 865.

3. *The present suit for damages.* After the district court's decision setting aside his conviction, petitioner instituted this suit against respondent and others.[4] The complaint alleged that Pachtman and others had

> acted individually and at other times collectively and conspiratorially * * * and by their acts of malfeasance, misfeasance, nonfeasance, negligence, and failure to inform and convict while under a duty to do so, planned and individually and/or collectively acted in concert to deprive plaintiff of his liberty by unlawfully charging him with murder and assault with intent to commit murder, and convicting him of the foregoing * * *. [App. 61–62.]

It further alleged that Pachtman, "a duly acting and appointed deputy district attorney of Los Angeles,"

> performed acts of malfeasance, misfeasance, failure to inform and correct, knowingly used

[4] The other defendants were members of the Los Angeles Police Department who were alleged to have conspired with Pachtman to violate petitioner's civil rights. The judgment of dismissal which is the subject of this petition was entered only as to Pachtman.

> testimony at the said trial via witnesses he produced for the people, wherein said testimony, or some of it, was perjured, and the said RICHARD PACHTMAN knew of the perjured nature of said testimony and failed to correct and halt the same from being utilized to convict this plaintiff [App. 63–64].

The complaint sought exemplary damages of $1,200,000.00 and actual damages of $1,500,000.00 (App. 80).

The district court dismissed the complaint against Pachtman (App. 104–112). It held that Pachtman was covered by the immunity from civil liability that prosecutors have "for acts done as part of their traditional official functions" (App. 107; see App. 110).

The court of appeals (one judge dissenting) affirmed (App. 116–120, 121–125). It held that "[t]he acts of the defendant which allegedly harmed appellant occurred during prosecutorial activities which can only be characterized as an 'integral part of the judicial process'" (App. 116). It observed that "[t]he protection given a prosecutor acting in his quasi-judicial role protects not simply the prosecutor, but, more importantly, the effective operation of the judicial process, and hence the 'common good'" (App. 118–199).

SUMMARY OF ARGUMENT

1. Prosecutors, as quasi-judicial officers, have the same absolute immunity from tort liability for acts done as part of their official duties that judges and jurors have. This Court has consistently held that judges are immune from civil liability for damages

for acts done within the general scope of their jurisdiction even if it is claimed that the act was done maliciously. Similarly this Court and the courts of appeals have held, by analogy to cases concerning judges, that prosecutors have the same absolute immunity.

This Court's recent decisions in *Scheuer* v. *Rhodes,* 416 U.S. 232, and *Wood* v. *Strickland,* No. 73–1285, decided February 25, 1975, are consistent with this analysis. In providing only a qualified immunity for some state executive officials (*Scheuer*) and school officials (*Wood*), the Court discussed with apparent approval its prior holdings granting absolute immunity to judicial officials.

2. Absolute immunity for prosecutors is necessary for the proper performance of their duties. Prosecutors would be reluctant to prosecute close and difficult cases if they knew that should the prosecution fail they would be subject to a suit for damages in which they would have to disprove charges that they had acted maliciously or in bad faith. A qualified immunity would not adequately insure the uninhibited performance of prosecutorial functions that is necessary for proper criminal law enforcement.

3. There are remedies other than damage suits that provide adequate protection against prosecutorial misconduct. The built-in systems of review in the criminal system assure against most misconduct. In addition, prosecutors who seriously overstep the bounds of professional conduct are subject to disciplinary proceedings, and, if the prosecutor's misconduct is itself a crime, he is subject to criminal prosecution.

ARGUMENT

PROSECUTORS, AS QUASI-JUDICIAL OFFICERS, HAVE THE SAME ABSOLUTE IMMUNITY FROM LIABILITY FOR DAMAGES FOR ACTS DONE AS PART OF THEIR OFFICIAL DUTIES THAT JUDGES AND JURORS HAVE

A. JUDGES AND JURORS ARE IMMUNE FROM CIVIL LIABILITY FOR ACTS PERFORMED WITHIN THE SCOPE OF THEIR OFFICIAL DUTIES, REGARDLESS OF ALLEGATIONS OF MALICE

1. Judges have long been accorded an absolute immunity from civil liability for acts done in the performance of their official duties. See, *e.g.,* the discussion in *Spalding* v. *Vilas,* 161 U.S. 483, 493–495. The tradition of protecting judges from such vexatious litigation stems from English precedent and has deep roots within American jurisprudence. As early as 1810, in *Yates* v. *Lansing,* 4 Johns Rep. 282, 15 N.Y. Common Law Rep., a judge was held immune from civil liability based on the claim that he had wrongfully imposed a prison sentence upon the plaintiff, who had previously been discharged on a writ of *habeas corpus* by another judge.

More than a hundred years ago this Court in *Bradley* v. *Fisher,* 13 Wall. 335, held that judges have an absolute immunity for acts done as part of their official duties. In that case, an attorney sued a District of Columbia judge for damages allegedly sustained "by reason of the [judge's] wilful, malicious, oppressive, and tyrannical acts and conduct" in disbarring the attorney (*id.* at 336). This Court held that the suit would not lie, because "judges of courts of superior or general jurisdiction are not liable to civil actions

for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly" (*id.* at 351).

The Court stated (*ibid.*) that a judge was not liable even where he acted in "excess of jurisdiction" but only where there was a "clear absence of all jurisdiction over the subject-matter." The Court added (13 Wall. at 354) that the immunity

> * * * cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. * * * But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed.

The Court reaffirmed these principles in *Pierson* v. *Ray*, 386 U.S. 547. In holding that a municipal police judge is not liable for damages in a suit under Section 1983 for having convicted the plaintiffs under a statute subsequently held unconstitutional, this Court observed (*id.* at 553–554):

> Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley* v. *Fisher*, 13 Wall. 335 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." * * * His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

2. Similarly, members of grand juries and petit juries have been accorded an absolute immunity from civil liability for damages sought on the basis of their participation in the judicial process as jurors. For example, the Indiana Supreme Court in *Hunter* v. *Mathis*, 40 Ind. 356, held that the plaintiff could not maintain a suit against a grand juror alleging that the latter, maliciously and without probable cause, had procured his indictment, which was quashed. The court stated (*id.* at 358):

> Few persons would be willing to act as grand jurors, if, upon the testimony of their fellows or others * * * they would be liable to be subjected to an action and to the payment of damages. * * * Let it be conceded that grand jurors are sometimes influenced by improper motives, which it is believed is not often the case, and still the evils which would result from any other rule would be far more frequent and pernicious than those resulting from this.

See, also, *Sidener* v. *Russell,* 34 Ill. App. 446; *White* v. *Hegerhorst,* 418 F. 2d 894 (C.A. 9), certiorari denied, 398 U.S. 912; *Roberts* v. *Barbosa,* 227 F. Supp. 20 (S.D. Cal.). Cf. *Phelps* v. *Dawson,* 97 F. 2d 339, 340 (C.A. 8); *Cooper* v. *O'Connor,* 99 F. 2d 135, 141 (C.A.D.C.), certiorari denied, 305 U.S. 643; *Yaselli* v. *Goff,* 12 F. 2d 396, 404 (C.A. 2), affirmed *per curiam,* 275 U.S. 503.

B. PROSECUTORS DO AND SHOULD HAVE THE SAME ABSOLUTE IMMUNITY AS JUDGES AND JURORS

1. This Court has ruled that prosecutors have the same absolute immunity from liability for damages for acts done in the performance of their official duties as judges have. *Yaselli* v. *Goff,* 275 U.S. 503, affirming 12 F. 2d 396 (C.A. 2).

In that case Yaselli sued Goff, a Special Assistant to the Attorney General of the United States, for malicious prosecution growing out of Yaselli's indictment, trial and acquittal on charges of conspiring to defraud the United States. Yaselli alleged that Goff had maliciously, falsely and illegally induced the grand jury to indict him (12 F. 2d at 397–398); that upon the trial the court had directed a verdict of acquittal (*id.* at 398); and, in response to Goff's defense that everything he had done had been "in the due performance of his duties as such special assistant" (*ibid.*), that Goff's appointment to that position was itself a step in furtherance of the conspiracy "to prosecute the plaintiff maliciously and without cause" (*ibid.*). In affirming a dismissal of the complaint, the court of appeals, after first discussing the absolute

immunity of judges, jurors and attorneys in presenting cases to a court (*id.* at 399–404), stated (*id.* at 404):

> A United States attorney, if not a judicial officer, is at least a quasi judicial officer, of the government. He exercises important judicial functions, and is engaged in the enforcement of the law. The reasons for granting immunity to judges, jurors, attorneys, and executive officers of the government apply to a public prosecutor in the performance of the duties which rest upon him.

The court ruled (*id.* at 406):

> In our opinion the law requires us to hold that a special assistant to the Attorney General of the United States, in the performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution based on an indictment and prosecution, although it results in a verdict of not guilty rendered by a jury. The immunity is absolute, and is grounded on principles of public policy. The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions. They should be no more liable to private suits for what they say and do in the discharge of their duties than are the judges and jurors, to say nothing of the witnesses who testify in a case.

Finally, the court held that Yaselli's claim that Goff had "conspire[d] willfully and maliciously to get himself appointed as prosecutor, in order that he may

willfully and maliciously indict and prosecute the person he seeks to punish" did not destroy the immunity (*id.* at 407):

> In our opinion, the reasons which compel us to hold that one who obtains an appointment as a prosecuting officer of the government is immune from civil liability for acts done by him in the discharge of his official duties apply in like manner to protect him against such a charge as that he was governed by improper motives in securing the appointment. The important fact is that he was appointed to the office, and, having been appointed, the public interests require that he shall be free and fearless to act in the discharge of his official duties. If he cannot be charged with acting willfully and maliciously after he gets appointed to the office, no more can he be charged with having conspired to get into the office in order to act willfully and maliciously after he gets his appointment. The one charge is as much to be feared as the other, and is equally derogatory to his public character and usefulness in the office. [Ibid.]

After hearing oral argument, this Court affirmed, *per curiam* (275 U.S. 503), "on the authority of" *Bradley* v. *Fisher, supra,* and *Alzua* v. *Johnson,* 231 U.S. 106, in which the absolute immunity of judges was applied to a judge of the Supreme Court of the Philippine Islands.

This Court's affirmance in *Yaselli* "on the authority of" those cases was a ruling that the absolute immunity recognized in those cases for judges applies equally to a prosecutor. See *Barr* v. *Matteo,* 360 U.S.

564, 569. The court of appeals had held that prosecutors, like judges and jurors, have an absolute immunity "for what they say and do in the discharge of their duties" (12 F. 2d at 406). This Court's *per curiam* affirmance was a recognition that, in light of *Bradley* and *Alzua,* the absolute immunity of prosecutors was so clear as not to require any extended analysis or discussion.

The complaint in the present case does not allege a conspiracy by respondent Pachtman maliciously and unlawfully to prosecute petitioner, but the alleged use of perjured testimony to convict him. That distinction, however, provides no basis for distinguishing *Yaselli.* The ruling in that case was that a prosecutor has an absolute immunity for acts done in the performance of his prosecutorial functions and that the immunity cannot be destroyed by allegations that in performing that duty he acted maliciously or illegally. The particular form that such alleged improper performance of his duty takes is immaterial.

As petitioner recognized (App. 63), in prosecuting him respondent Pachtman was performing his duty as the deputy district attorney of Los Angeles. Since all the acts upon which petitioner's complaint is based were within the scope of respondent's authority as a prosecutor because they were part of the trial of the case that respondent was presenting, under *Yaselli* respondent is absolutely immune from liability for damages based upon those acts.

2. In light of the foregoing authorities and the policy considerations discussed below, it is hardly surprising that eight circuits have recognized that

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prosecutors have absolute immunity for acts done in the performance of their official functions.[5]

[5] *District of Columbia Circuit*

Cooper v. *O'Connor*, 99 F. 2d 135, certiorari denied, 305 U.S. 643 (claim that the United States Attorney maliciously and without probable cause sought and secured an indictment against plaintiff).

Laughlin v. *Garnett*, 138 F. 2d 931, certiorari denied, 322 U.S. 738 (claim that the United States Attorney instituted prosecution on criminal charges known to be false and prepared forged documents for use against plaintiff).

Laughlin v. *Rosenman*, 163 F. 2d 838 (claim that United States Attorney General and special assistant utilized false testimony in order to indict petitioner, who was later acquitted).

Second Circuit

Gregoire v. *Biddle*, 177 F. 2d 579, certiorari denied, 339 U.S. 949 (claim that two successive United States Attorneys General knowingly falsely imprisoned plaintiff as a suspected enemy alien).

Fanale v. *Sheehy*, 385 F. 2d 866 (claim that State prosecutor violated plaintiff's civil rights by maliciously prosecuting, suborning perjury, and signing false documents).

Third Circuit

Kauffman v. *Moss*, 420 F. 2d 1270, certiorari denied, 400 U.S. 846 (claim that State prosecutor violated plaintiff's civil rights by knowingly using false testimony to convict him).

Moore v. *Buck*, 443 F. 2d 25 (claim that State prosecutor caused denial of plaintiff's right to a speedy trial and improperly placed a detainer on him).

Bethea v. *Reid*, 445 F. 2d 1163, certiorari denied, 404 U.S. 1061 (claim that United States Attorney maliciously prosecuted plaintiff and suborned perjury).

Cambist Films, Inc. v. *Duggan*, 475 F. 2d 887 (claim against State prosecutor who supervised the seizure of films later determined not to be obscene).

Fifth Circuit

Carmack v. *Gibson*, 363 F. 2d 862 (claim that State prosecutor picked and struck jurors unlawfully, in violation of plaintiff's civil rights).

A number of those cases involve claims, similar to those made here, that the prosecutor knowingly used

Guedry v. *Ford*, 431 F. 2d 660 (claim that State prosecutor and judge maliciously conspired to convict plaintiff in violation of his civil rights).

Williams v. *Weinberger*, 494 F. 2d 1191 (claim that State prosecutor denied plaintiff access to police reports and further impaired plaintiff's ability to prepare his defense by causing him to be jailed).

Seventh Circuit

Cawley v. *Warren*, 216 F. 2d 74 (claim that State prosecutor and grand jury foreman knowingly procured indictment without probable cause, in violation of federal civil rights laws).

Jennings v. *Nester*, 217 F. 2d 153, certiorari denied, 349 U.S. 958 (claim that State prosecutor and police knowingly perpetrated illegal search and seizure and subornation of perjury in violation of plaintiff's civil rights).

Peckham v. *Scanlon*, 241 F. 2d 761 (claim that State prosecutor and others purposely and maliciously impeded plaintiff's attempts to secure collateral review through state habeas corpus proceedings in violation of his civil rights).

Kalec v. *Adamowski*, 406 F. 2d 536 (claim that State prosecutor knowingly used false testimony, in violation of federal civil rights laws).

Berg v. *Cwiklinski*, 416 F. 2d 929 (claim under federal civil rights laws that judge and local prosecuting attorney illegally convicted plaintiff of contempt when he refused to answer questions propounded to him during his own trial, in violation of his Fifth Amendment privilege against self-incrimination).

Eighth Circuit

Barnes v. *Dorsey*, 480 F. 2d 1057 (claim that State prosecutor knowingly suppressed exculpatory evidence in violation of plaintiff's civil rights).

Duba v. *McIntyre*, 501 F. 2d 590 (claim under federal civil rights laws that local district attorney maliciously swore out arrest warrant and attached plaintiff's property for failure to pay a fine).

Ninth Circuit

Sires v. *Cole*, 320 F. 2d 877 (claim under federal civil rights laws that State prosecutor participated in imposing felony sentence upon plaintiff for misdemeanor).

Harmon v. *Superior Court of State of California*, 329 F. 2d 154 (claim against State prosecutor for alleged violation of civil rights through prosecution of plaintiff for failing to support his family).

Agnew v. *Moody*, 330 F. 2d 868 (claim against State prosecutor under federal civil rights laws based upon defendant's prosecution of plaintiff for vehicular violation).

Tenth Circuit

Kostal v. *Stoner*, 292 F. 2d 492, certiorari denied, 369 U.S. 868 (claim that local prosecutor suborned perjury and suppressed exculpatory evidence in violation of federal civil rights laws).

Although the First and Fourth Circuits have not directly ruled on the issue, decisions in those circuits are not to the contrary.

First Circuit

Rudnicki v. *McCormack*, 210 F. Supp. 905 (D. Mass. and R.I.) (claim that State and federal prosecutors denied plaintiff's civil rights by defending judges' actions in appellate courts).

Guerro v. *Mulhearn*, 498 F. 2d 1249 (holding that a prosecutor has only a qualified immunity in his investigatory activity, without ruling on the degree of immunity for his immediate prosecutorial functions).

Fourth Circuit

Weathers v. *Ebert*, 305 F. 2d 514 (claim that State district attorney deprived plaintiff of his civil rights by indicting and prosecuting plaintiff for offense upon which he had already been acquitted; claim dismissed on pleadings without reaching question of absolute immunity).

Phillips v. *Singletary*, 350 F. Supp. 297 (D. S.C.) (claim that State prosecutor participated in conspiracy to deprive plaintiff, convicted for rape, of his civil rights).

McCray v. *State of Maryland*, 456 F. 2d 1 (acknowledged in dicta the absolute immunity of judges and prosecutors while granting a court clerk only a qualified immunity for a ministerial act).

false evidence[6] or suppressed evidence favorable to the defendant.[7]

Three of the circuits (the Fifth, Seventh and Ninth) distinguish between a prosecutor's acts which are part of his immediate prosecutorial functions (such as obtaining witnesses and presenting evidence), for which his immunity is absolute, and his purely investigative functions (such as planning or participating in a search or seizure), for which there is only a qualified immunity, *i.e.*, the acts are not immune if

The Sixth Circuit has also recognized the prosecutor's absolute immunity: .

Kenney v. *Fox*, 232 F. 2d 288, certiorari denied, 352 U.S. 855 (claim that State prosecutor had participated in known false arrest and malicious prosecution in violation of plaintiff's civil rights).

Thompson v. *Heither*, 235 F. 2d 176 (claim of false arrest and malicious prosecution against local prosecutor based upon federal civil rights laws).

Hurlburt v. *Graham*, 323 F. 2d 723 (claim that State prosecutor knowingly used false testimony in prosecution of plaintiff in violation of his civil rights).

Gabbard v. *Rose*, 359 F. 2d 182 (claim that State prosecutor tried and convicted plaintiff under the wrong statute, in violation of federal civil rights laws).

But by analogy to acts outside the prosecutorial function (and without citation to its prior decisions), the Court of Appeals for the Sixth Circuit recently permitted a suit for monetary damages against a State prosecutor for alleged introduction of known false or misleading evidence. *Hilliard* v. *Williams*, 465 F. 2d 1212, certiorari denied, 409 U.S. 1029.

[6] *Laughlin* v. *Garnett*, *supra*; *Laughlin* v. *Rosenman*, *supra*; *Fanale* v. *Sheehy*, *supra*; *Kauffman* v. *Moss*, *supra*; *Bethea* v. *Reid*, *supra*; *Hurlburt* v. *Graham*, *supra*; *Jennings* v. *Nester*, *supra*; *Kalec* v. *Adamowski*, *supra*. But see *Hilliard* v. *Williams*, *supra*.

[7] *Kostal* v. *Stoner*, *supra*.

done maliciously.[8] We think this distinction is unsound, since investigatory work may be an integral and important part of the prosecutor's functions. There is no need to reach that question here, however, since in this case the gravamen of petitioner's complaint is the prosecutor's alleged misconduct in the trial of the case.

In any event, neither the Fifth nor the Ninth Circuits has held, as petitioner suggests (Pet. Br. 34–36), that a prosecutor's "bad faith" destroys the absolute immunity he has for acts done as part of his direct prosecutorial functions. As the court below noted, "[t]he purported distinction [between acts in good

[8] The following acts have been held directly related to prosecutorial duties and thus covered by absolute immunity: (1) alleged use of altered tapes of confession at preliminary hearing (*Ney* v. *State of California*, 439 F. 2d 1285 (C.A. 9)); (2) claimed subornation of perjury (*Marlowe* v. *Coakley*, 404 F. 2d 70 (C.A. 9), certiorari denied, 395 U.S. 947); (3) alleged malicious institution of criminal charges (*Guedry* v. *Ford*, 431 F. 2d 660 (C.A. 5)); (4) claimed use of illegal methods of picking and striking jurors from *voir dire* panel (*Carmack* v. *Gibson*, 363 F. 2d 862 (C.A. 5)); (5) claimed intentional delay in dropping charges after exculpatory evidence discovered (*Tyler* v. *Witkowski*, 511 F. 2d 449 (C.A. 7)); (6) prosecutor's conditioning dismissal of charge on defendant's agreement not to sue for damages (*Boyd* v. *Adams*, 513 F. 2d 83 (C.A. 7)).

The following acts have been considered investigatorial and thus not absolutely immune: (1) planning an allegedly illegal search (*Hampton* v. *City of Chicago*, 484 F. 2d 602 (C.A. 7), certiorari denied, 415 U.S. 917; *Guerro* v. *Mulhearn*, 498 F. 2d 1249 (C.A. 1)); (2) ordering deputies to coerce a guilty plea (*Lewis* v. *Brautigam*, 227 F. 2d 124 (C.A. 5)); (3) allegedly keeping potential defendant incarcerated without benefit of appearance before magistrate (*Robichaud* v. *Ronan*, 351 F. 2d 533 (C.A. 9)); (4) claimed supervision of false arrests (*Madison* v. *Purdy*, 410 F. 2d 99 (C.A. 5)).

faith and in bad faith] undermines the purpose of the absolute immunity previously recognized, because the addition * * * of an easy to make but difficult to prove charge of knowing and malicious prosecutorial misconduct to any complaint would suffice to require a full trial on the merits of the prosecutor's conduct while acting as a judicial officer" (App. 117–118, n. 2). See, also, *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (C.A. 2), certiorari denied, 339 U.S. 949; *Bradley* v. *Fisher*, quoted, *supra*, at p. 10.

3. This Court's recent decisions in *Scheuer* v. *Rhodes*, 416 U.S. 232, and *Wood* v. *Strickland*, No. 73–1285, decided February 25, 1975, are consistent with this analysis. There the Court held that in damage suits under Section 1983, state executive officials (*Scheuer*) and school officials (*Wood*) had only a qualified immunity for acts done in performance of their official duties, *i.e.*, they were immune only as long as they acted in good faith and not maliciously. Cf. *O'Connor* v. *Donaldson*, No. 74–8, decided June 26, 1975, slip. op., p. 13.

The Court in *Scheuer* discussed with apparent approval its prior ruling in *Pierson* v. *Ray*, *supra*, that in Section 1983 Congress had not "intended to abolish the common-law 'immunity of judges for acts within the judicial role'" (416 U.S. at 244). Similarly, in *Wood*, the Court pointed out that in *Pierson* "we concluded that the common-law doctrine of absolute judicial immunity survived" the enactment of Section 1983 (slip op. at 9). Since, as we have shown, the absolute immunity of prosecutors derives from and is analogous to that of judges, the fact that in

Scheuer and *Wood* executive officials were given only the narrower qualified immunity does not call for a similar narrowing of the absolute immunity prosecutors traditionally have had.

In *Wood,* the Court concluded (slip op. at 12) that the "judgment implicit in" "the development by state courts of a qualified immunity protecting school officials from liability for damages in lawsuits claiming improper suspensions or expulsions * * * is that absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." As we now show, an absolute immunity not only substantially "increase[s] the ability of [prosecutors] * * * to exercise their discretion in a forthright manner," but is necessary to accomplish that objective.

C. ABSOLUTE IMMUNITY FOR PROSECUTORS IS NECESSARY FOR THE PROPER PERFORMANCE OF THEIR FUNCTIONS

1. The policy upon which absolute immunity for government officials for acts done in the performance of their official functions is based was forcefully set forth by Judge Learned Hand speaking for the court in the leading case of *Gregoire* v. *Biddle,* 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries

> he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. [177 F. 2d at 581.]

See, also, the statements from *Bradley* v. *Fisher* and *Pierson* v. *Ray,* quoted, *supra,* at pp. 10–11.

These considerations are particularly significant for prosecuting attorneys. Prosecutors constantly make difficult and close decisions on a large number of sensitive issues. These include such questions as whether to present a case to the grand jury, whether

to prosecute a case at trial, whether to dismiss an indictment against particular defendants, whether to call witnesses whose character is dubious and whether to present certain evidence. Frequently a prosecutor may decide—particularly where there is a sharp conflict in the evidence—that it is appropriate to permit the jury to resolve the question and he therefore goes ahead with a prosecution with full awareness that the jury may find the defendant's evidence convincing and acquit him.

In such cases there is a strong public interest in a thorough airing of the facts in a public trial, to enable an impartial jury to decide the question of guilt or innocence. The conflict in the evidence, however, may make a prosecutor particularly susceptible to being charged with acting in bad faith if the jury refuses to convict. Many prosecutors would be reluctant to go forward in such a case if they knew that, should the jury acquit, they would then be forced to defend before a jury the good faith of their actions against the charge that they acted maliciously or arbitrarily. A defendant in a criminal case is likely to bring such a suit since he tends to view the prosecutor as his enemy, the man responsible for his predicament. The result would be that the public interest in proper enforcement of the criminal laws would be jeopardized because of prosecutors' unwillingness to present close cases where there was a significant likelihood of acquittal.

If the judge directs a verdict or the jury acquits the defendant, it is but a short step for the defendant

to conclude that he has been the victim of a vendetta conducted by the prosecutor in which his enemy has engaged maliciously in all kinds of illegal conduct. As the Court pointed out in *Bradley* v. *Fisher, supra,* the criminal courts determine "[c]ontroversies involving * * * the liberty and character of the parties" which "consequently excit[e] the deepest feeling," and in which

> the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge. [13 Wall. at 348.]

This reasoning is equally applicable to the prosecutor, whom the defendant is equally, or perhaps more, likely to blame for his situation.

A qualified rather than an absolute immunity would not be adequate to insure the vigorous and fearless performance of the prosecutor's duties that is necessary to the proper functioning of the criminal justice system. Such an immunity is lost if the prosecutor has acted maliciously or perhaps unreasonably—the exact contours of and standards for the qualified immunity are uncertain. Charges that the prosecutor acted improperly are easy to make. Often "it is impossible to know whether the claim is well founded

until the case has been tried'' (*Gregoire* v. *Biddle, supra,* 339 U.S. at 949), or to be certain that the jury will vindicate the prosecutor's actions in initiating or conducting a particular criminal case.

Once the elements of malice or arbitrariness become the touchstone for determining the prosecutor's liability for damages, it "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties" (*ibid.*), to know that their possible liability for damages would depend upon a jury's subsequent evaluation of their motives and good faith in conducting the prosecution. Only an absolute immunity, in which the sole inquiry is whether the prosecutor's actions were taken in the performance of his official duties, will suffice to avoid the dangers to the public interest that the immunity doctrine is designed to prevent.[9]

The present case dramatically illustrates the dangers for effective law enforcement that a qualified immunity standard would create. The seven Justices of the Supreme Court of California all agreed, upon the basis of an extensive evidentiary hearing, that most of petitioner's allegations that the principal government witness had testified falsely had not been

[9] Moreover, because a prosecutor's good faith is the issue under the qualified immunity standard, that standard often would require prosecutors to engage in protracted litigation, frequently involving extensive discovery, which would divert them from their primary task. See *Barr* v. *Matteo*, 360 U.S. 564, 571. But because the issue presented under the absolute immunity rule is the narrower one of whether the prosecutor has acted in the performance of his official duties, cases under that rule—and particularly the many that are lacking in merit—can be disposed of more expeditiously.

established, that the state's representatives were unaware of the single statement of that witness found to be false, that the fingerprint expert had not knowingly testified falsely, and that if he had acted negligently, that negligence did not deny petitioner a fair trial (*supra,* pp. 4–5). On the same record, however, four federal judges concluded that the same witness had testified falsely with respect to six items (App. 42–43) and that to each of those items "the prosecutor had knowledge of such falsity, or, if he did not have actual knowledge, that he had reason to believe such testimony was false and his reckless use thereof in disregard of such reason is to be treated the same as knowing use of false testimony'' (App. 53).

In the light of this sharp disagreement among the judges over what the record establishes, it is impossible to predict how a jury would react if it were required to determine whether respondent Pachtman had acted maliciously or arbitrarily in trying the case against petitioner. Yet the case involved a callous murder, and there was a strong public interest in bringing the guilty person to trial. Moreover, the evidence against petitioner was strong. Several eye-witnesses identified him as the man wearing a coat and hat who left the market just after the murder, and, indeed, petitioner was arrested as a result of a second armed robbery in which his accomplice was identified by the wife of the murdered man as the accomplice in the murder (App. 15). On the basis of the evidence originally presented, the jury convicted and the Supreme Court of California affirmed. The evidence had been fully tested at trial.

The additional questions concerning the truthfulness of some of the testimony and alleged suppression of evidence were injected into the case thereafter as a result of additional testimony given at the hearing conducted by Justice White for the Supreme Court of California, which found the conviction proper. While hindsight might now suggest to a jury trying the damage claim that respondent Pachtman had acted improperly in prosecuting the case, there is little to indicate that at the time he tried the case he knowingly committed any misdeeds.

Respondent Patchman was aware, when he tried the case, that his principal witness, Costello, was a man with a prior criminal record (App. 38); in criminal cases, however, the prosecutor frequently has to use unsavory people as witnesses. If respondent Patchman had been aware that, if petitioner were convicted and his conviction were subsequently set aside because of the determination of a federal judge made in a collateral proceeding that false testimony had been knowingly or recklessly used, he might be forced to defend his good faith in a suit seeking damages of almost $3 million, one wonders whether Patchman would have proceeded with the case at all despite the strong evidence against petitioner.

The problem that a qualified immunity for prosecutors would pose is that it would require prosecutors at a later time to satisfy a jury that they acted in good faith in conducting a criminal case whose ultimate outcome was favorable to the defendant. Perhaps in most cases the prosecutor could prevail. The critical consideration in determining the proper scope

of his immunity, however, is not the prosecutor's probability of successfully defending the suit, but the inhibiting effect upon the vigorous performance of his duties that giving him only a qualified immunity for such performance inevitably would have. Like a judge, a prosecutor's "errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption" (*Pierson* v. *Ray, supra,* 386 U.S. at 554).

2. There are remedies other than damage suits that provide adequate methods for dealing with prosecutorial improprieties. As the court of appeals in the present case recognized (App. 120, n. 4), "the threat of private liability as a sanction for abuse of power is less necessary in the judicial system, which provides institutionalized systems of review to correct errors."

If the prosecutor has engaged in misconduct that has denied defendant a fair trial, those errors can be corrected by the trial judge, on appeal, or, as in the present case, in a collateral attack upon the conviction. A prosecutor who seriously oversteps the bounds of proper professional conduct may be disciplined or censured by the court, either on its own motion or as a result of disciplinary proceedings initiated by the local bar association. Finally, if the prosecutor's misconduct should constitute a crime, such as subornation of perjury, or violation of federal criminal civil rights laws, he may be criminally prosecuted therefor like anyone else who violates the law. "[T]he judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct pro-

scribed by an Act of Congress * * *'" (*O'Shea* v. *Littleton,* 414 U.S. 488, 503); in this respect it is similar to executive privilege, which "has never been applied to shield executive officers from prosecution for crime" (*Gravel* v. *United States,* 408 U.S. 606, 627).[10]

As the Court of Appeals for the District of Columbia Circuit recently stated in *Apton* v. *Wilson,* 506 F. 2d 83, 93–94:

> * * * [T]he prosecutor's absolute protection, like that of the judge from which it is derived, is both justified and bounded by the judicial traditions and procedures that limit and contain the danger of abuse. Cases holding prosecutors absolutely immune have referred to them as "quasi-judicial officers," and the circumstances typically provide alternative instruments of the judicial branch to check misconduct—the discretion of the grand jury, the procedures of a trial, and the potential sanction of discipline imposed by the court itself.

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[10] If the prosecutor has been convicted of a crime involving acts done in performance of his official duties, the reason for giving him absolute immunity for such acts no longer exists. In that circumstance, the immunity should no longer be available to shield him from damage liability for those acts.

CONCLUSION

This Court should hold that prosecutors have absolute immunity from liability for damages for acts done in the performance of their official duties.

Respectfully submitted.

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IN THE

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October Term, 1974
No. 74-5435

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Petitioner,

vs.

RICHARD PACHTMAN, District Attorney,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF RESPONDENT

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BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF RESPONDENT

Interest of Amicus Curiae

The State of California through its Attorney General presents this brief as *amicus curiae* in support of respondent pursuant to Rule 42(4) of the Rules of this Court. Since petitioner seeks to abrogate the absolute immunity of public prosecutors from federal civil rights liability for acts arising out of performance of their quasi-judicial functions in the trial of criminal cases, California is deeply concerned that the loss of such immunity may impair the ability of its more than 2,000 state, county, and city prosecutors to enforce its criminal laws in the current forthright and fearless manner.

The overhanging specter of vexatious, but potentially successful damage suits may deter the prosecution of criminal cases involving close questions of constitutional law. For this reason, the State of California by and through its Attorney General presents this brief in support of absolute immunity.

Question Presented

Distilled to a single issue, petitioner is asking this Court to decide the extent of the immunity of a prosecutor to a lawsuit brought against him under the federal civil rights act in circumstances where the highest court in California has denied petitioner's application for habeas corpus relief by finding that the prosecutor did not knowingly adduce perjured testimony or suppress evidence but where a single federal judge later found to the contrary. (See Petn. Br. 19-22.)

Statement of the Case

A. The State Trial Proceedings

Petitioner, who was convicted of first degree murder and of assault with a deadly weapon with intent to commit murder, took an automatic appeal to the California Supreme Court after a jury had fixed his penalty at death. *People v. Imbler*, 57 Cal. 2d 711, 713, 21 Cal. Rptr. 568, 569, 371 P. 2d 304, 305 (1962). At trial Mrs. Morris Hassen had testified that on the evening of January 4, 1961, two men attempted to rob her store and one of them shot and killed her husband. Three eyewitnesses who were in the vicinity, Alfred Costello, Alonzo Dunlap, and Billy Hillen all subsequently had identified petitioner as one of the assailants. *People v. Imbler, supra*, 57 Cal. 2d at 714, 21 Cal. Rptr. at 569-70, 371 P. 2d at 305-06. At

trial Costello had testified that he crossed the street when he heard a shot after he saw two men standing at the cash register in Mrs. Hassen's store, that he viewed petitioner wearing a hat and coat and still carrying a gun from a distance of 8 to 12 feet and that he chased petitioner while petitioner ran down an alley and dropped his hat. Costello further testified that then petitioner paused in the alley as if he was trying to decide which way to go during which time he could see petitioner without the hat at a distance of between 15 and 20 feet, that petitioner fired a shot that hit a wall behind him, discarded his coat, and fled to a parking lot and that he retrieved the coat and discovered a gun in it subsequently identified as the murder weapon. Costello positively identified appellant as the man he had pursued. *Id.*

At trial neither petitioner nor his counsel at any time complained that the prosecutor had knowingly or unwittingly suppressed any evidence or adduced perjured testimony from Alfred Costello. Similarly, no such claim was made when petitioner took his automatic appeal to the California Supreme Court.

B. The State Habeas Corpus Proceedings

Subsequently, petitioner filed an application for habeas corpus relief in the California Supreme Court which alleged that in his actions at trial the prosecutor had secured petitioner's conviction by knowingly using perjured testimony. *In re Imbler*, 60 Cal. 2d 554, 559, 35 Cal. Rptr. 293, 296, 387 P. 2d 6, 8 (1963). Pursuant to an order of the California Supreme Court, a referee took evidence on petitioner's claims. *In re Imbler, supra*, 60 Cal. 2d at 560, 35 Cal. Rptr. at 296, 387 P. 2d at 8. In upholding the referee's de-

cision that there was no use of perjured testimony, the California Supreme Court made the following rulings:

1. The fact that Costello testified at the reference hearing that petitioner was not the man he chased, whereas he had testified to the contrary at the preliminary hearing and the trial, did not constitute perjury but merely showed that Costello had changed his mind. *In re Imbler, supra,* 60 Cal. 2d at 560-61, 35 Cal. Rptr. at 296, 387 P. 2d at 9.

2. Costello's change in testimony at the reference hearing which cast doubt upon his very positive statements at the trial regarding his identification of petitioner had been thoroughly impeached and discredited by witnesses at the reference hearing, whereas his testimony at the murder trial itself concerning his identification of petitioner had been corroborated by the testimony of the other two eyewitnesses and was consistent with other circumstances in the case so that there was no knowing perjury. *In re Imbler, supra,* 60 Cal. 2d at 561-62, 35 Cal. Rptr. at 296-97, 387 P. 2d at 9-10.

3. There was no evidence that Costello willfully gave false testimony at the trial about seeing petitioner's photograph, but rather his testimony at the reference hearing showed he was confused about when he had seen a photograph of petitioner and the form of it. *In re Imbler, supra,* 60 Cal. 2d at 562-64, 35 Cal. Rptr. at 297-98, 387 P. 2d at 10-11.

4. While it was established at the reference hearing that Costello had given false testimony on redirect examination at the trial about receiving degrees from the University of California after his

release from state mental hospitals, petitioner had not proved any knowledge of those falsehoods by representatives of the State of California in that there was no evidence to show that any person connected with the prosecution knew of Costello's educational background, and the prosecutor had no reason to disbelieve or duty to verify the information Costello had given him during a recess immediately after the cross-examination about Costello's having had several college degrees. *In re Imbler, supra,* 60 Cal. 2d at 564-65, 35 Cal. Rptr. at 298-99, 387 P. 2d at 11-12.

5. While Costello had testified on cross-examination that he had only one felony conviction whereas his "make sheet" introduced at the reference hearing showed that he had two felony convictions, if the prosecutor was to be charged with knowledge of the contents of the "make sheet" petitioner had to be charged with this same knowledge. *Id.*

6. Despite petitioner's contention that Costello had perjured himself on redirect examination at trial when he testified that his commitment to the the state mental hospital was voluntary, Costello simply meant that he had voluntarily pleaded not guilty by reason of insanity under California Penal Code section 1026, which was the section shown at the reference hearing to have been the one upon which the commitment was based. *In re Imbler, supra,* 60 Cal. 2d at 565-66 and n. 3, 35 Cal. Rptr. at 298-300, 387 P. 2d at 11-12.

7. The fact that an expert for the prosecution changed his testimony at the reference hearing regarding the identification of one of the finger-

prints on an item of evidence as not being petitioner's did not indicate that he intentionally gave false testimony at the trial as to the number of fingerprints or as to whether they were identified, but rather was an honest error in expert testimony and was not perjury. *In re Imbler, supra,* 60 Cal. 2d at 566-67, 35 Cal. Rptr. at 300-01, 387 P. 2d at 12-13.

8. The outcome of petitioner's trial would not have been affected even if the police had suppressed the fact that a co-employee of petitioner's was unable to identify the coat dropped by the killer. *In re Imbler, supra,* 60 Cal. 2d at 568, 35 Cal. Rptr. at 301, 387 P. 2d at 13-14.

Because of improper statements by the prosecutor and improper instructions by the trial court, the California Supreme Court subsequently reversed the judgment imposing the death penalty upon petitioner pursuant to his second petition for writ of habeas corpus in the state courts. *In re Imbler,* 61 Cal. 2d 556, 557-58, 39 Cal. Rptr. 375, 376, 393 P.2d 687, 688 (1964). On remand, petitioner was sentenced on the murder count to life imprisonment. *Imbler v. Craven,* 298 F. Supp. 795, 797 (C.D. Cal. 1969); *Imbler v. California,* 424 F. 2d 631 (9th Cir. 1970), *cert. denied,* 400 U.S. 865 (1970).

C. The Federal Habeas Corpus Proceedings

After the United States District Court for the Eastern District of California denied petitioner's initial federal application for habeas corpus relief, the United States Court of Appeals for the Ninth Circuit reversed that decision and transferred the case to the Central District pursuant to 28 U.S.C. § 2241(d). *Imbler v. Craven, supra,* 298 F. Supp. 795, 797 (C.D. Cal. 1969). In that federal proceeding in the Central District the court took no new evidence whatsoever but instead considered "the complete reporters' transcripts of petitioner's trial and of the state habeas corpus hearing, as well as the referee's report thereon. . . ." *Id.*

Based upon the state court record alone and no new evidence, the single judge in the district court considering the habeas corpus petition determined that Costello had given false testimony at petitioner's trial as to (1) whether Costello saw petitioner's mugshots prior to the lineup; (2) whether he was voluntarily or involuntarily committed to a state hospital in 1946; (3) whether he had previously been convicted of more than one felony ; (4) whether he had attended any universities or obtained any degrees therefrom after his release from the mental hospitals and prisons; (5) whether he had earned an average of $10,000 a year for the four years preceding the trial and; (6) whether he had been trying to "straighten" himself out since he had been "in trouble with the law." *Id.* at 803. Unwilling actually to state that the prosecutor had had actual knowledge as to each of these allegedly false statements by Costello, the district court held that as to each of the six items either the prosecutor had actual knowledge of the falsity or, if he did not have such knowledge, he had reason to believe the testimony was false so that his reckless use thereof was to be treated the same as if he had knowingly used false testimony. *Id.* at 808-809. Specifically, the district court held:

1. The prosecutor had actual and definite knowledge that Costello's statement about his "voluntary" commitment to a state hospital was false and he purposely and intentionally led Costello to make that statement. *Id.* at 806;

2. Even if the prosecutor did not have knowledge that Costello had seen pictures of petitioner prior to the lineup, he was charged with the knowledge thereof because of the knowledge of the police thereto. *Id.;*

3. The prosecuting attorney knew that Costello had been convicted of more than one felony and, at least, deliberately failed to take full notice of the significance of the facts in the "make sheet" that showed Costello had been convicted of at least two other felonies. *Id.* at 807;

4. Since the prosecutor had reason to believe that Costello had not been attemtping to "straighten out," the prosecutor knowingly attempted to create an impression in the minds of the jurors which he knew was false when he asked Costello if he had been trying to do just that. *Id.;* and

5. Costello's false testimony about his two alleged university degrees and his claimed annual income was so highly suspect that it amounted to the reckless use of highly suspicious false testimony which should have been known to be false and it thus fell within the prohibition against the knowing use of perjured evidence. *Id.* at 807-08.

The district court also concluded that evidence of the third fingerprint had been suppressed by the police even if the prosecuting attorney was not aware of its existence or even if it was just negligently suppressed. *Id.* at 810-11. The district court, accordingly, granted the petition for writ of habeas corpus. *Id.* at 812.

Thus, even though there was no evidence that the prosecutor had adduced perjured testimony or suppressed evidence, the district court found that the prose-

cutor had denied petitioner a fair trial solely because he had not recognized the falsity of some statements made by Costello which the district court felt should have been apparent from a comparison with Costello's other statements and with various documents available at the time of petitioner's trial. On appeal the United States Court of Appeals for the Ninth Circuit affirmed the order of the district court. It held that the district court had accepted the " 'historical-fact determinations' " of the state court and instead had reached different conclusions from the state court in applying federal constitutional standards to those facts. *Imbler v. State of California,* 424 F. 2d 631, 632 (9th Cir. 1970).

D. The Federal Civil Rights Litigation

Subsequently, in the case of *Imbler v. Pachtman,* in the United States District Court for the Central District of California, case number Civil 71-123-RJK, petitioner sought damages against deputy district attorney Pachtman under the Civil Rights Act, 42 U.S.C. § 1983, on the grounds that respondent Pachtman knowingly adduced false and perjured testimony from Costello and that he had suppressed evidence at the trial. (*See* Appendix, pp. 104-06.) In ruling on the motion to dismiss by Pachtman, the district court limited itself to the specific factual allegations of petitioner's first amended complaint because it believed that there was no authority sanctioning, let alone requiring, that the findings made in the federal habeas corpus proceedings had to be applied as *res judicata* or collateral estoppel in favor of a plaintiff in a subsequent civil rights action growing out of the same incident especially where, as in the case at bar, the party defendants were different and there had been no showing of substantiality of interest between the defendant in the habeas corpus

proceeding and the then present defendants. (Appendix, pp. 106-07.) After a discussion of the basis for and scope of prosecutors' immunity (Appendix, pp. 107-110), the court granted the motion for dismissal as to respondent Pachtman despite the allegations that he acted "badly, perhaps wrongfully and even maliciously," producing perjured and false testimony in his attempt to convict petitioner because it appeared that "the production of testimony is well within the traditional function of prosecutors no matter how wrongfully done and, hence, within the prosecutorial privilege." (Appendix, p. 111.)

Petitioner appealed from the district court's dismissal of his civil rights complaint. *Imbler v. Pachtman*, 500 F. 2d 1301 (9th Cir. 1974). The Ninth Circuit affirmed the dismissal of the complaint, stating that the dismissal by the lower court was consistent with that court's prior decisions. *Id.* at 1302. It concluded that the acts of respondent Pachtman which allegedly harmed petitioner occurred during prosecutorial acts that could only be characterized as an " 'integral part of the judicial process.' " *Id.* It also rejected petitioner's claim that respondent Pachtman engaged in non-immune police activity when he asked two police officers during a recess to discuss criminal charges with the prosecution's chief witness since that was a quasi-judicial act within the purpose of the immunity. *Id.* at 1303 and n. 3. It further held that this Court's decision in the case of *Scheuer v. Rhodes*, 416 U.S. 232 (1974) did not require a contrary result because that case dealt with the immunity of executive officers whereas prosecutorial immunity is not a form of executive immunity but rather one of judicial immunity. *Id.* at 1304 and n. 4. Finally, after noting that the Cali-

fornia Supreme Court on precisely the same facts which were before the district court in the habeas corpus proceeding had found there was no evidence that the prosecutor had knowingly used perjured testimony, the Ninth Circuit held that the determinations of the federal district court in the habeas corpus proceeding were not *res judicata* as to respondent Pachtman because he was not actually a party to the habeas corpus proceeding and thus in any other suit under the Civil Rights Act against the prosecutor a full trial would be required, which was a burden and risk which immunity was designed to prevent. *Id.* at 1304 and n. 6.

Subsequently, petitioner filed his petition for writ of certiorari in this Court. Certiorari was granted on February 24, 1975.

ARGUMENT

Public Prosecutors Should Remain Immune From Civil Rights Liability for Acts Committed in the Performance of Duties Constituting an Integral Part of the Judicial Process

In *Pierson v. Ray*, 386 U.S. 547, 554 (1967), this Court noted that the legislative history of section 1 of the Civil Rights Act of 1971, 17 Stat. 13, now 42 U.S.C. § 1983, gave ". . . no clear indication that Congress meant to abolish wholesale all common-law immunities." Earlier in *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), this Court viewed immunity as a tradition so rooted in "history and reason" as to preclude any legislative intent to exclude it. In *Pierson v. Ray, supra*, this Court found that "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction. . . ." 386 U.S. at 553-54. As a consequence, this Court held that, had Congress wished to abolish judicial immunity, it would have specifically so provided when it enacted 42 U.S.C. § 1983.

California submits that the quasi-judicial immunity of public prosecutors is as well grounded in "history and reason" as the immunities of state legislators in *Tenney* and those of judges in *Pierson*. Well prior to the enactment of 42 U.S.C. § 1983, Blackstone recognized the importance of prosecutorial immunity when he stated that ". . . it would be a very great discouragement to the public justice of the kingdom, if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried." 3 W. Blackstone, *Commentaries* 126 (St. George Tucker ed. 1803). Indeed, the doctrine of prosecutorial immunity was so well established by the earlier part of this century that this Court was enabled to affirm summarily a definitive application of the doctrine by the Second Circuit. *Yaseli v. Goff*, 12 F. 2d 396 (2d Cir. 1926), *affirmed per curiam*, 275 U.S. 503 (1927). The common-law antecedents of prosecutorial immunity were fully canvassed in the Second Circuit opinion, which found the quasi-judicial immunity of prosecutors to be coextensive with that accorded to judges. 12 F. 2d at 404, 406. The doctrine of prosecutorial immunity recognized in *Yaseli v. Goff* was reaffirmed by this Court in *Barr v. Matteo*, 360 U.S. 564, 569 (1959), when it was again observed that an absolute immunity like that of judges ". . . extends to other officers of government whose duties are related to the judicial process."

The foregoing precedents demonstrate that the doctrine of prosecutorial immunity has common-law origins as well recognized as those of the judicial immunity upheld in *Pierson v. Ray*. The authorities canvassed in the definitive opinion of the Second Circuit in *Yaseli v. Goff, supra*, indicate that prosecutorial immunity was a settled doctrine when the civil rights statute was enacted in 1871. Therefore, since prosecutorial immunity derives from the same sources as judicial immunity, it must likewise follow that Congress would have specifically provided for abolition of the doctrine in enacting 42 U.S.C. § 1983 if it had so intended. *See Pierson v. Ray, supra*, 386 U.S. at 554-55.

With one exception, the courts of appeals are in general agreement that public prosecutors are immune from suit under section 1983 for acts committed in the performances of quasi-judicial duties in the prosecution of criminal cases. *Hampton v. City of Chicago,*

Cook County, Illinois, 484 F. 2d 602, 607-09 and n. 7 (7th Cir. 1973), *cert. denied,* 415 U.S. 917 (1974); *Barnes v. Dorsey,* 480 F. 2d 1057, 1060 (8th Cir. 1973); *Madison v. Gerstein,* 440 F. 2d 338, 340-41 and n. 5 (5th Cir. 1971); *Ney v. State of California,* 439 F. 2d 1285, 1287 (9th Cir. 1971); *Guedry v. Ford,* 431 F. 2d 660, 663-64 (5th Cir. 1970); *Wilhelm v. Turner,* 431 F. 2d 177, 180-83 (8th Cir. 1970), *cert. denied,* 401 U.S. 947 (1971); *Kauffman v. Moss,* 420 F. 2d 1270, 1272-73 (3d Cir. 1970), *cert. denied,* 400 U.S. 846 (1970); *Peek v. Mitchell,* 419 F. 2d 575, 578-79 (6th Cir. 1970); *Marlowe v. Coakley,* 404 F. 2d 70, 71 (9th Cir. 1968), *cert. denied,* 395 U.S. 947 (1969); *Fanale v. Sheehy,* 385 F.2d 866, 868 (2d Cir. 1967); *Carmack v. Gibson,* 363 F. 2d 862, 864 (5th Cir. 1966); *Bauers v. Heisel,* 361 F. 2d 581, 584-91 and nn. 7-9 (3d Cir. 1966), *cert. denied,* 386 U.S. 1021 (1967); *Rhodes v. Meyer,* 334 F. 2d 709, 717-18 (8th Cir. 1964), *cert. denied,* 379 U.S. 915 (1964), 383 U.S. 939 (1966); *Hurlburt v. Graham,* 323 F.2d 723, 725 (6th Cir. 1963); *Phillips v. Nash,* 311 F. 2d 613, 616 (7th Cir. 1962), *cert. denied,* 374 U.S. 809 (1963); *Laughlin v. Rosenman,* 163 F. 2d 838, 842-43 (D.C. 1947). Of course, a prosecuting attorney is not shielded by immunity when he engages in activities that are not part of his quasi-judicial function. *See, e.g., Robichaud v. Ronan,* 351 F. 2d 533 (9th Cir. 1965) (prosecutor acted as policeman in interrogation of murder suspect); *Lewis v. Brautigam,* 227 F. 2d 124, 128-29 (5th Cir. 1955) (prosecutor allegedly directed police efforts to extort a plea of guilty from a suspect).

Hilliard v. Williams, 465 F. 2d 1212, 1217 (6th Cir.), *cert. denied,* 409 U.S. 1029 (1972), is the sole

exception to the general rule that prosecutors are absolutely immune from suit for acts which constitute part of the judicial process. It contains no analysis of the policy behind the doctrine of absolute immunity and appears to be a misapplication of the rule followed in the *Robichaud* case, a rule that applies only to acts falling wholly outside the prosecutorial role in the judicial process.

The immunity of both judges and prosecutors has always been held to be absolute and unconditional. The broad scope of this immunity is founded on considerations of public policy. With respect to the doctrine of judicial immunity, this Court has stated:

> "This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the prosecution or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences.' (Citations omitted.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." *Pierson v. Ray, supra,* 386 U.S. at 554.

Like considerations support the absolute immunity of public prosecutors from suits based on acts committed in the course of criminal prosecutions. The lead-

ing case, affirmed by this Court in a *per curiam* opinion, couched the doctrine of prosecutorial immunity in terms remarkably similar to those used by Chief Justice Warren for the majority in *Pierson v. Ray:*

> "In our opinion the law requires us to hold that a special assistant to the Attorney General of the United States, in performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution based on an indictment and prosecution, although it results in a verdict of not guilty rendered by a jury. The immunity is absolute, and is grounded on principles of public policy. The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions. They should be no more liable to private suits for what they say and do in the discharge of their duties than are the judges and jurors, to say nothing of the witnesses who testify in a case." *Yaseli v. Goff, supra,* 12 F. 2d at 406.

Since the *Pierson* decision clearly establishes that the common law immunities not expressly abrogated by Congress in the adoption of 42 U.S.C. § 1983 apply in civil rights litigation, it is of no moment that *Yaseli* was decided in the context of a tort suit for malicious prosecution rather than an action brought directly under section 1983.

Furthermore, the approach utilized by this Court in *Pierson* does not admit of qualifications to immunities which were absolute at common law. Once it is determined that an immunity existed at common law, that

immunity is given its full scope in civil rights litigation. A judge's immunity is absolute in civil rights cases because that immunity was absolute at common law; a police officer has no absolute and unqualified immunity in such suits because he had none at common law. *Pierson v. Ray, supra,* 386 U.S. at 554-55. This approach should be followed here as well, since the passage of time has eroded none of the policy considerations which led to the creation at common law of an absolute, quasi-judicial immunity for prosecutors for acts which are an integral part of the judicial process. Indeed, nowhere in his brief does petitioner contend that the underpinnings of the doctrine have been altered so as to require immunity once absolute now be qualified. Petitioner concedes the wisdom of prosecutorial immunity for acts performed by prosecutors in the normal prosecutorial role. (Petn. Br. 35.)

Petitioner urges this Court to adopt a test that permits a civil rights suit against a prosecutor whenever it is alleged in the complaint that his acts were improper exercises of the prosecutorial power. In answering the dissent below, the Ninth Circuit wisely concluded that such an approach would effectively destroy the doctrine of prosecutorial immunity. The Court stated:

> "The dissent argues that deliberate suppression of evidence or subornation of perjured testimony is unprotected by quasi-judicial immunity because such acts, being improper exercises of prosecutorial power, are not an integral part of the judicial process; the dissent therefore concludes that our prior cases do not confer immunity when the complaint charges knowing and malicious abuse of prosecutorial power. The purported distinction undermines the purpose of the absolute immunity

previously recognized, because the addition of an easy to make but difficult to prove charge of knowing and malicious prosecutorial misconduct to any complaint would suffice to require a full trial on the merits of the prosecutor's conduct while acting as a judicial officer." *Imbler v. Pachtman, supra,* 500 F. 2d at 1302 n. 2.

As Judge Learned Hand explained in *Gregoire v. Biddle,* 177 F. 2d 579, 581 (9th Cir. 1949), the reason for the doctrine of absolute immunity is that ". . . it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." Under Judge Hand's well-reasoned view, abuse of prosecutorial power does not place the prosecutor's act outside the scope of his quasi-judicial function for purposes of immunity. Judge Hand explained:

> "The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as

> would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him." 177 F. 2d at 581.

The acts of respondent which allegedly harmed petitioner all involved the questioning of a witness during petitioner's 1961 criminal prosecution, and, as such, they can only be characterized as an "integral part of the judicial process." *Imbler v. Pachtman, supra,* 500 F. 2d at 1302-03. If a prosecutor is not absolutely immune from suit for the questions he asks and the answers he adduces in the course of a criminal trial, he may be more vulnerable than either the witnesses he calls or the attorneys in civil cases. In defamation cases, statements made by attorneys and witnesses in the course of formal judicial proceedings have been held to be absolutely privileged. *See, e.g., Mock v. Chicago, R.I. & P. R.R.,* 454 F. 2d 131, 133 (8th Cir. 1972); *Petty v. General Accident Fire & Life Assurance Corp.,* 365 F. 2d 419, 421 (3d Cir. 1966). The Second Circuit recognized this seeming anomaly stating:

> "To hold that an attorney of a private client is clothed with absolute privilege, and that a public prosecutor whose duty it is to enforce the laws of the United States, is not exempt because of what he says and does in the discharge of the duties of his office, is so unreasonable, so contrary to sound public policy, and to the fundamental principles of our jurisprudence, that we cannot accept it."

* * *

Petitioner asserts that this Court should sanction a civil rights suit against a prosecuting attorney whenever that suit is preceded by the grant of a writ of habeas corpus on the same allegation upon which the

civil rights suit is based. (Petn. Br. 47-50.) At the outset, this proposed qualification to otherwise absolute immunity appears to conflict with the well settled rule that civil rights litigants need not exhaust other judicial remedies as a prerequisite to bringing an action under 42 U.S.C. § 1983. *See Allee v. Medrano,* 416 U.S. 802, 814 (1974) (no requirement of exhaustion of state remedies). Such an *ex post facto* limitation on prosecutorial immunity also ignores the fact that the immunity doctrine itself recognizes that there will be instances where a prosecutor may be immune from suit for serious misconduct. As the court below observed, the balance between the evils at either extreme ". . . has consistently been struck in favor of protecting honest criminal prosecution, at the expense of those injured by scoundrels, by granting immunity from suit to all prosecutors." *Imbler v. Pachtman, supra,* 500 P. 2d at 1304. This Court recognized that a similar balance was struck with respect to the absolute immunity accorded to members of the judiciary. *Pierson v. Ray, supra,* 386 U.S. at 554. While the interest of the individual litigant might be somewhat advanced by the qualification which petitioner urges on this Court, it is doubtful that the public interest would be served by making the prosecutor answerable in damages if, but only if, the plaintiff successfully convinces a federal district judge to reach a different result from that reached by the state judges who affirmed the plaintiff's conviction and denied post-conviction relief.

Finally, petitioner argues that prosecutors should be treated as members of the executive branch who have only a qualified immunity from suit as illustrated by this Court's recent decision in *Scheuer v. Rhodes, supra,* 416 U.S. 232 (1974). The basic weakness of petitioner's argument is that the American system of justice has never viewed the prosecutor as a functionary whose sole duty is to obtain convictions. Indeed, in *Berger v. United States,* 295 U.S. 78, 88 (1935), this Court expressly rejected such a narrow view of the prosecutor's role, stating:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."

The American Bar Association's Code of Professional Responsibility uses similar language to describe the ethical obligation of the prosecuting attorney. ABA Code Prof. Resp. § EC 7-13. *See also* ABA Standards Relating to the Administration of Criminal Justice, "The Prosecution Function," § 1.1(c), at 83 (Compilation, 1974).

Thus, the majority opinion in the court below correctly disposed of petitioner's argument in reliance on *Scheuer v. Rhodes* when it stated:

> ". . . If anything, *Scheuer* tends to support our position. The Court there recognized . . . that the immunity of executive officers has historically 'been of a more limited nature' than that of judicial officers—undoubtedly because the threat of private liability as a sanction for abuse of power is less necessary in the judicial system, which provides institutionalized systems of review to cor-

rect errors. Prosecutorial immunity is not a form of executive immunity, but rather a form of judicial immunity . . . designed to protect the judicial process; it attaches only to prosecutorial acts 'constituting an integral part of the judicial process.' " *Imbler v. Pachtman, supra,* 500 F. 2d at 1304 n. 4.

Conclusion

For the foregoing reasons, amicus curiae State of California joins respondent Pachtman in urging that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT
OF THE UNITED STATES

October Term, 1974
No. [redacted]

PAUL KERN IMBLER,

Petitioner,

v.

RICHARD PACHTMAN,
Deputy District Attorney,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE

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IN THE
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RICHARD PACHTMAN,
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Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE

This brief is filed with this Court pursuant to the authority found in Rule 42, Paragraph 2 of the Supreme Court Rules.[1/]

INTEREST OF AMICUS CURIAE

The National District Attorneys Association is a nonprofit, nonpolitical, tax

1. Written consent of the parties has been obtained and with a cover letter is enclosed as part of the package containing this brief.

exempt corporation composed of approximately 6,000 members representing all 50 states. The purposes of the National District Attorneys Association are, inter alia, to improve and to facilitate the administration of justice in the United States and to promote the study of law in legal institutions.

To effectuate these aims the National District Attorneys Association for many years has utilized an amicus curiae committee to file briefs in cases of national importance in the United States Supreme Court. We seek to make known the views of prosecutors in the United States and to bring before this Court their position on matters affecting the discharge of the duties of prosecutors in their everyday work.

Crime in the United States has grown to such an extent that it is only through vigorous prosecution that the criminal justice system can help stem the tide of those that would undermine our society. If a prosecutor must look over his shoulder in each case in which he is involved in order to protect himself and his family from the possibility and uncertainties of a civil law suit, pursuant

to 42 USC section 1983[2], because of actions he has taken in the course of prosecuting persons charged with crimes, the effectiveness of the criminal justice system may not only be reduced but it is quite possible that in many instances vigorous prosecution may not even be instituted.

The case at bar raises the foregoing issues and is therefore of utmost concern to the prosecutors of the United States. We discuss our views more fully below.

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2. 42 USC § 1983 provides: "Every person, who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

QUESTION PRESENTED

SHOULD A PROSECUTING ATTORNEY BE SUBJECTED TO THE THREAT OF PERSONAL CIVIL SUIT PURSUANT TO 42 USC § 1983[3] ARISING FROM EVERY ACTION TAKEN BY HIM IN THE COURSE OF HIS DUTIES?

SUMMARY OF ARGUMENT

An independent prosecutor is a necessity in our society today. The volume of cases processed by prosecutors throughout the United States and the time needed to prepare individual cases is such that a prosecutor might be concerned that many years after the case before the court is concluded someone may look over the prosecutor's shoulder and conclude, based on factors which the prosecutor no longer remembers, that the prosecutor either knew or should have known that he deprived the defendant of a fair trial.

Judges enjoy judicial immunity in order to insulate the system of justice (hereinafter designated judicial process) from outside influence in the performance of its function. Judicial immunity exists

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3. It should be noted that federal civil rights actions may also be brought in state courts; see, for example: California (Brown v. Pitchess, 13 Cal.3d 518, 531 P.2d 772 [1975]) and Illinois (Alberty v. Daniel, _____Ill._____, 323 N.E.2d 110 [1974]).

regardless of the type of mistake or motive of the judge in violating civil rights of a defendant. Similarly, in order for a prosecutor to do his job effectively within the judicial system and to protect the fair and impartial operation of that system, the prosecutor must remain as independent as possible, uninfluenced by the threat of civil suit.

It is said that all attorneys are officers of the court and as such must deal honestly with the court before which they appear and must abide by a certain code of eithics. Nevertheless, a prosecutor is in a unique situation since he is not only an advocate for a particular position in a case, i.e., representing the People, but he also occupies a quasi-judicial position in that he not only initiates criminal prosecutions, but also must process these prosecutions with an eye towards justice rather than conviction.

Any tampering with the immunity accorded to prosecutors as participants in the judicial process can only impair the functioning of that process since prosecutors will feel compelled to second guess themselves before and during the processing of cases.

We submit public policy favors personal immunity for prosecutors acting in the course of their employment.

ARGUMENT

IMMUNITY SHOULD BE ACCORDED A PROSECUTOR FOR ACTIONS TAKEN BY HIM IN THE COURSE OF TRIAL IN A CRIMINAL CASE AND HE SHOULD NOT BE LIABLE UNDER 42 USC § 1983 FOR SUCH CONDUCT

I

THE PRACTICAL EFFECTS OF PROSECUTORIAL IMMUNITY ARE CONSISTENT WITH PUBLIC POLICY

The basic issue is whether a prosecuting attorney, herein, a deputy district attorney for the County of Los Angeles, State of California, should be accorded immunity when faced with a civil rights lawsuit in which the plaintiff alleges that the deputy district attorney violated plaintiff's civil rights through the knowing use of perjured testimony in obtaining the conviction or by negligently using perjured testimony when the deputy district attorney should have known of its perjured character.

In examining the practical effects of civil rights lawsuits against a prosecutor we shall first consider the dual role of the prosecutor in the judicial system as an advocate who exercises discretionary power and who initiates and processes cases through the judicial system in the interest of justice.

As stated by Chief Justice Burger, when he was still a member of the Court of Appeal in Newman v. United States, 382 F.2d 479, 481 (D.C. Cir. 1967):

> "An attorney for the United States, as any other attorney, however, appears in a dual role. He is at once an officer of the court and the agent and attorney for a client; in the first capacity he is responsible to the Court for the manner of his conduct of a case, i.e., his demeanor, deportment and ethical conduct; but in his second capacity, as agent and attorney for the Executive, he is responsible to his principal and the courts have no power over the exercise of his discretion or his motives as they relate to the execution of his duty within the framework of his professional employment. This dual role is perhaps best illustrated as follows:
>
> "'Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular

> case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary power of the attorneys of the United States in their control over criminal prosecutions.'

"United States v. Cox, supra note 4, 342 F.2d at 171."

Surely the imposition by the legislative branch of the government of liability upon a prosecutor pursuant to 42 USC § 1983, if not deemed an unconstitutional infringement upon the doctrine of separation of powers, must nevertheless be deemed as infringing upon that doctrine since, as we shall demonstrate herein, it will inhibit the functioning of the prosecutor, a member of the executive branch of government.

We shall conclude this brief by examining the effect that the failure to grant prosecutorial immunity in such civil rights actions will have on the functioning of the judicial process.

A

ROLE OF THE PROSECUTOR IN THE JUDICIAL PROCESS

1. The Prosecutorial Function is Discretionary

The prosecutor stands at a critical point in the American criminal justice system.

He functions at the hub of the system, working directly with the police, the courts, the people. The duty of the prosecutor is to "seek justice."[4] Although an advocate operating within an adversary system, he is obliged to protect the innocent as well as convict the guilty, to guard the rights of the accused as well as enforce the rights of the public:[5]

> "The prosecutor has a dual role which reflects in a sense the ambivalence of public attitudes on law enforcement and is the source of some difficulties. On the one hand, the prosecutor is the leader of law enforcement in the community. He is expected to participate actively in marshaling society's resources against the threat of crime. When a crises in the enforcement of criminal law arises in the community, the public press and others clamor for a 'war against crime' and he may be drawn into the maelstrom of political controversy by the demand that he 'stamp out the criminals.' He

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4. ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, THE PROSECUTION FUNCTION, Section 1.1(c). (Approved Draft, 1971) [hereinafter cited as ABA STANDARDS.]

5. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (Final Draft, 1969) [hereinafter cited as ABA CODE]; United States v. Kline, 221 F. Supp. 776 (D. Minn. 1963).

is called upon to make public statements, to propose legislative reforms, or to direct the energies of the law enforcement machinery of the community. On the other hand, the office demands and on sober thought the public expects, that the prosecutor will respect the rights of persons accused of crime. Our nation began with resistance to oppressive official conduct and our traditions, embodied in the national and state constitutions, demand that the prosecutor accord basic fairness to all persons. Because of the power he wields, we impose on him a special duty to protect the innocent and to safeguard the rights guaranteed to all, including those who may be guilty. The conflicting demands on a prosecutor may exert pressures on him which his sense of fairness as a lawyer rejects. Both his public responsibilities as well as his obligations as a member of the bar require that he be something more than a partisan advocate intent on winning cases."[6]

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6. ABA STANDARDS, THE PROSECUTION FUNCTION, Introduction, pp. 19-20.

In this role of quasi-judicial "minister of justice",[7] the American prosecutor exercises a vast amount of discretion.[8] Prosecutorial discretionary power in criminal proceedings arises not by statute but from the Common Law.[9] Underlying this immunity is a recognition of

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7. See the Commentary to ABA STANDARDS, PROSECUTION FUNCTION, Section 1.1.

8. Various commentators have advanced the following definitions of "discretion" in this context: "an authority conferred by law to act in certain conditions or situations, in accordance with the official's or the official agencies' own considered judgment and conscience," La Fave, The Prosecutor's Discretion in the United States, 18 Am. J. Comp. L. 532 n. 1. (1970); Professor Davis posits that a "public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action," K. Davis, DISCRETIONARY JUSTICE 4 (1969) [hereinafter cited as Davis]; See generally Pound, Discretion, Dispensation and Mitigation; The Problem of the Individual Special Case, 35 N.Y.U. L.Rev. 925 (1960); Baker & DeLong, The Prosecuting Attorney: The Process of Prosecution, 26 J. Crim. L. & Crim. 647 (1935); Kaplan, The Prosecutorial Discretion--A Comment, 60 Nw. U. L.Rev. 174 (1965).

9. At Common Law the prosecuting attorney had absolute control of the criminal prosecution. See United States v. Thompson, 251 U.S. 407; 40 S.Ct. 289 (1920); Confiscation Cases, 7 Wall 454, 19 L.Ed. 196 (1868); United States v. Brokaw, 60 F.Supp. 100 (S.D. Ill. 1945); Fay v. Miller, 183 F.2d 986 (D.C. Cir. 1950).

the need for leniency in particular cases,[10] a flexible procedure necessary to effectuate that end, and adherence to the theories of criminal law which are aimed to some degree at societal purposes other than crime prevention.[11] Implicit in the attitude of the courts is a basic recognition that the nature of the decision to process criminal cases requires that the process be discretionary with the prosecutor for the decision to prosecute involves a delicate weighing of a myriad of subjective and objective factors:

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10. Two needs are apparent: The first is the need on the part of the public and the courts for personalized justice, "rather than literalistic adherence" to laws. L. Miller, DOUBLE JEOPARDY AND THE FEDERAL SYSTEM, 118 (1968). See LaFave, supra, note 16, at 534 (1970); Silkenat, Limitations on Prosecutor's Discretionary Power to Initiate Criminal Suits: Movement Toward a New Era, 5 Ottawa L.Rev. 104, at 107 (1971). The second is the desire by prosecutors that their function not appear to be one of "persecutors", Ploscowe & Spiero, The Prosecuting Attorney's Office and the Central of Organized Crime, MANUAL FOR PROSECUTING ATTORNEYS, at 317; F. Miller, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 187 (1969).

11. Justice Breitel favors lenient discretion, a discretionary power which would "ameliorate or avoid the effective application of the literal criminal code." Breitel, Controls in Criminal Law Enforcement, 27 U. Chi. L.Rev. 427, at 430 (1960).

> "[D]iscretionary judgment is the product of the inevitable need for mediation between generally formulated laws and the human values contained in the varieties of particular circumstances in which the law is technically violated."[12]

In Pugach v. Klein, the court recognized the delicate nature of the decision to prosecute:

> "Surely it is for the United States Attorney to decide whether the public interest is better served by prosecuting or declining to prosecute . . . the likelihood of conviction . . . the degree of criminality, the weight of the evidence, the credibility of witnesses, precedent, policy, the climate of public opinion, timing, gravity of the offense . . .
>
> "Still other factors are the relative importance of the offense compared with competing demands of other cases on the time and resources of investigation, prosecution and trial. All of these numerous other intangible and unponderable factors must be carefully weighed and considered by the United States Attorney in deciding whether or not to

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12. Kadish, Legal Norm and Discretion in the Police and Sentencing Process, 75 Harv. L.Rev. 904, at 913 (1969).

prosecute.

"All of these considerations point up the wisdom of vesting broad discretion in the United States Attorney. The federal courts are powerless to interfere with his discretionary power. The Court cannot compel him to prosecute a complaint or even an indictment, whatever his reasons for not acting. The remedy for dereliction of his duty lies, not with the courts, but, with the executive branch of our government and ultimately with the people."[13]

Although the prosecutor's discretion is most pronounced with respect to the initiation and discontinuance of criminal proceedings, certainly the prosecutor exercises a vast amount of discretion in the manner of prosecution (i.e., order and examination of witnesses, motions, strategy, etc.) once prosecution has been initiated. The nature of and considerations underlying prosecutorial discretion in initiation and discontinuance decisions apply equally to the prosecutor's discretionary decisions throughout prosecution. Indeed, at the time the prosecutor considers filing a case he

13. Pugach v. Klein, 193 F.Supp. 630, at 634 (S.D.N.Y. 1961).

must consider all aspects of it, i.e., the effect and weight of the evidence to be presented (including the witnesses he will call to testify and the nature of their testimony) and whether such evidence would be sufficient, beyond a reasonable doubt, to convict. (See, for example, ABA STANDARDS §§ 3.9(a) and (b).) The role of the prosecutor must thus be deemed as discretionary throughout the processing of a case in the judicial system. In essence, the discretionary nature of the charging process requires that decisions which the prosecution makes thereafter, because they are an integral part of the charging process, also must be within the discretion of the prosecutor.[14]

14. Similarly, it should be noted that the prosecutor's discretion is not limited to criminal proceedings, since civil remedies (for example, civil consumer fraud actions, diversion of narcotic offenders, anti-trust suits) are often part of a prosecutor's arsenal.

2. The Prosecutor's Function Is Exercised In The Interests Of Justice

The initiation and prosecution of a criminal case[15] is a function delegated

15. While immunity derived from the processing of cases through the judicial system is not necessarily limited to criminal cases, we consider only such cases in this brief since that is the context in which the matter sub judice arose.

by the People solely to a prosecutor,[16] who thereby controls the flow of cases into the criminal justice system. Thus anything which affects the exercise of discretion by a prosecutor must necessarily affect the entire judicial process. As stated in Pearson v. Reed, 44 P.2d 592 (1935) [6 Cal.App.2d 277]:

> "A prosecutor is called upon to determine, upon evidence submitted to him, whether a criminal offense has been committed by the person accused--exactly the same question that is presented to

16. Most states provide for this unique function by constitutional provisions or statutes such as the following:

Article VI, section 20 of the California Constitution provides: "The style of all process shall be 'The people of the State of California,' and all prosecutions shall be conducted in their name and by their authority." (Emphasis added.)

"The district attorney is the public prosecutor. He shall attend the courts, and conduct on behalf of the people all prosecutions for public offenses." (Calif. Gov. Code § 26500; emphasis added.)

Illinois Revised Statutes, Chapter 14, § 5 (1969) provides that the state's attorney shall:

"[C]ommence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in any court of record in his country, in which the people of the state or county, may be concerned." (Emphasis added.)

a court or jury upon trial. His decision is no less judicial in character if it be erroneous or swayed by prejudice or malice. It does not matter whether the evidence before him be much or little or whether he hears all or only some of it. His authority to investigate the facts before acting is unlimited and the matter rests in his own discretion. He is a quasi- judicial officer and he is also an executive officer." (44 P.2d at 596-597 [6 Cal. App.2d at 286]).

Undoubtedly because of the broad consequences of the exercise of discretion by a prosecutor, certain limitations and sanctions have been imposed upon his office which are unique to his role as an advocate in the judicial process.

As already noted,[17] it is the prosecutor's duty not only to convict those charged with crimes against society but also to see that all defendants receive a fair trial and are not convicted by fowl means. If evidence which supports the acquittal of the defendant becomes known to a prosecuting attorney such evidence must be disclosed to the defense.

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17. See pp. 9-10, supra.

That is the law of California where Richard Pachtman is a career civil servant as a deputy district attorney in Los Angeles County. (See People v. Ruthford, _____Cal.3d_____, Crim. 18431, decided by the California Supreme Court on May 21, 1975; California Business and Professions Code sections 6076 et seq; ABA Standards § 3.11.) When a prosecutor withholds evidence favorable to the defense[18] or engages in misconduct at trial to the prejudice of a particular defendant,[19] his case against such defendant is dismissed or reversed on appeal. Indeed, not only may an attorney be subject to severe disciplinary action through the state bar association[20] if he attempts to benefit his client through the use of

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18. Brady v. Maryland, 373 U.S. 83; 83 S.Ct. 1194; 10 L.Ed.2d 215 (1962); Giles v. Maryland, 386 U.S. 66; 87 S.Ct. 793; 17 L.Ed. 2d 737 (1967); Miller v. Pate, 386 U.S. 1; 87 S.Ct. 785; 17 L.Ed.2d 690 (1967).

19. Giglio v. United States, 405 U.S. 150; 92 S.Ct. 764; 31 L.Ed.2d 104 (1972).

20. For example, California Business and Professions Code sections 6076 et seq.

perjured testimony but he may also be subject to criminal prosecution if he willfully procures perjured testimony. (In re Branch, 70 Cal.2d 200, 210-211; 449 P.2d 174 [1969]; see ABA STANDARDS, page 23.)

It is thus clear that the prosecutor has a duty to exercise his discretion in the interests of justice because of the unique quasi-judicial function which he performs in the judicial process. As stated in the ABA STANDARDS, p. 20:

> "Because of the power he wields, we impose on him a special duty to protect the innocent and to safeguard the rights guaranteed to all, including those who may be guilty. The conflicting demands on a prosecutor may exert pressures on him which his sence of fairness as a lawyer rejects. Both his public responsibilities as well as his obligations as a member of the bar require that he be something more than a partisan advocate intent on winning cases."

B.

THE LACK OF PROSECUTORIAL IMMUNITY WILL RESULT IN ADVERSE CONSEQUENCES FOR THE JUDICIAL PROCESS

1. Harmful Effect on the Independence of the Prosecutor.

In referring to the need for prosecutorial immunity, the eminent jurist Learned Hand, in Gregoire v. Biddle, 177 F.2d 579 at 581 (2d Cir. 1949), noted that without such immunity prosecutors would be forced to defend themselves on the merits in federal civil rights actions and such possibilities "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."

The judicial process does not commence without the prosecutor and "[T]he public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions." (Yaselli v. Goff,

et al., 12 F.2d 396, 406 [2d Cir. 1926], aff'd per curriam in 275 U.S. 503; 48 S.Ct. 185; 72 L.Ed. 395 (1927).)

As in the case sub judice, since the proof of the pudding is in the eating, if you do not decide to make the pudding you need not worry about a stomachache from eating too much pudding, i.e., if a case is not filed, a prosecutor will not violate the civil rights of the prospective defendant. Thus a prosecutor, wary of his actions because of possible personal disadvantage to himself, may intentionally, or more likely unintentionally, tread too lightly upon the yolk of his duties lest he stain himself.

In the case sub judice, the petitioner Imbler seeks to eradicate the concept of "quasi-judicial" immunity previously accorded to prosecutors.[21/] While such a result may, perhaps, be of

21. The plethora of such cases is well documented in petitioner's brief (see, for example, p. 37, n. 2, of Brief for Petitioner). We consider the legal underpinnings of this doctrine and why its rationale requires its continued existence in Part II, infra, of this brief. Herein we consider some more aspects of the practical effect of the elimination of the doctrine.

benefit to Imbler, himself,[22/] the judicial

22. Of course, the benefit to Imbler is itself rather problematical. One of the reasons this Court deemed it necessary to adopt the exclusionary rule was because of its belief that the experience of California and other states proved such remedies as civil remedies for damages to be "worthless and futile." (Mapp v. Ohio, 367 U.S. 643, 652, 81 S.Ct. 1684, 1690, 6 L.Ed.2d 1081, 1088.) As recently noted by Chief Justice Burger:

> "The problems of both error and deliberate misconduct by law enforcement officials call for a workable remedy. Private damage actions against individual police officers concededly have not adequately met this requirement, and it would be fallacious to assume today's work of the Court in creating a remedy will really accomplish its stated objective. . . ." (Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 421, 29 L.Ed.2d 619, 641, 91 S.Ct. 1999, 2017 [dissent].)

If such causes of action are deemed ineffective in their result against police officers' purported violations of the Fourth Amendment, why should it be anticipated that they would be more effective in their result against prosecutors. (Of course, as is pointed out elsewhere in this brief, it is not the liability which is the real issue in this case, but rather the cost and harassment involved in defending the suit, as well as the

[footnote continued on next page]

process will not gain thereby. The cases initiated in the judicial process will be subjected to scrutiny as to their effect not only upon the judicial process, but also their effect upon subsequently initiated civil rights actions. The prosecutor will screen cases with, in effect, one hand[23] tied behind his back since each discretionary act on his part may later be subject to review. The judicial system will not have the benefit of impartial objective decisions by the prosecutor since he will,

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[footnote brought forward]
infringement upon discretionary acts which are part of the judicial process.)

Yet, even if such causes of action would turn out to be effective in rare instances, should the judicial process seek to clear rotten apples from the bushel by overturning the entire bushel? We have already noted that our system of jurisprudence has other means of regulating the corrupt prosecutor. (See pp. 18-19, supra.) Certainly, reversal on appeal or disbarment are Draconian measures which have an immediate effect upon only a limited class of prosecutors without affecting the entire judicial process.

23. Perhaps he will have even two hands tied behind his back if he can be sued for damages both for those cases he does not initiate, as well as for his actions in the cases he initiates.

in reality, have a personal stake in each case.[24] Thus, the quality of cases processed through the judicial system may suffer. Furthermore, judges may become concerned with the effect of their review of a prosecution for fear of subjecting the prosecutor to an unjust lawsuit. For example, if a court concludes that the evidence does not warrant prosecution and the prosecutor should never have initiated criminal proceedings, the defendant may now wish to sue the prosecutor for a violation of his federal civil rights. Thus, making a prosecutor liable may, in turn, affect the conduct of a judge who may become overly protective of the prosecutor, thereby impairing the judicial processing of criminal cases.

In short, while a particular defendant may be the beneficiary of a cause of action, the judicial process as a whole will not benefit if prosecutorial immunity is not retained since defendants, in general, and society would be worse off

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24. Cf. Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972), wherein the trial judge only had an indirect interest in the outcome.

Although the financial rewards of prosecuting attorneys thoughout the United States obviously varies from place to place, we suggest that no one would doubt that the average prosecuting attorney is not going to become a wealthy man by virtue of his period of public service. Courageous and conscientious men and women are needed in prosecuting offices and, if the shadow of personal financial loss ten or fifteen years in the future lurks behind their every prosecutorial move, the result in many cases may only be human nature, i.e., prosecutors will be extremely cautious in their approach to the matters brought before them.

There may be no way to foretell how many governmental entities throughout the United States would pay compensatory damages, based upon a civil rights suit, for a prcsecutor employed by it. But even assuming that many governmental entities would pay compensatory damages from their general tax funds if the verdict was against the prosecutor, nevertheless it is unlikely they would be as generous if

punitive damages were also assessed against the prosecutor. Our system of justice calls for "average people" to sit as jurors and in our law books we see a wide range of monetary judgments entered against defendants although on the record the facts of the cases seem almost identical. A perfect example of what we mean is that two persons charged with a crime might have their case severed. On almost identical evidence one jury might acquit one defendant and the other jury might convict the other. Triers of fact are given wide latitude and the basic concept being was there sufficient evidence to support the judgment. Corporations and wealthy citizens are rightly concerned about law suits because jurors might grant large judgments against them since it appears they have almost unlimited resources. Open season on prosecutors by prisoners who have all the time in the world to become litigious could easily create problems for prosecutors similar to those facing physicians today.

By analogy we note that doctors are facing tremendous costs for malpractice insurance and in many instances they cannot obtain such insurance at any cost. It may be that doctors can avoid the possibility of many malpractice suits by overpracticing, i.e., being extremely thorough in their examinations and treatment so that the likelihood of malpractice suits will greatly diminish. However, when we attempt to overpractice in the justice system, i.e., be more the number of prosecutions because we want the cases filed to be solid winners. Such "overkill" conservatism in order to avoid being sued can only have a detrimental effect on society because cases that should have been prosecuted were not prosecuted. The tide of crime cannot be stemmed in such a fashion.

Moreover, since a prosecutor works for an agency of the government, jurors might conclude the prosecutor himself would not ultimately have to pay the damages.[25/]

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25. But see pages 26-27, supra.

Regardless of the result of a civil rights action against a prosecutor, the effect on prosecutors can only be to hamstring their actions, for while they are prosecutors by profession, they have their personal lives and obligations and do not want to be a target for lawsuit after lawsuit.

While the preceding discussion may appear only to be aimed at career prosecutors, it is not our intent to protect only career people but all persons who, for whatever length of time, are prosecuting attorneys. Indeed, those persons who know they will not make a career out of being a prosecuting attorney probably are part of a group larger than that of career prosecutors. A prosecutor's office is mainly a trial-oriented office and thus many people passing the bar examinations want a few years of experience in trial work and the office of the prosecutor is a good place to get such experience. While it might be argued that a career prosecutor will not be overly concerned about a civil suit against him because he may feel that the government entity which employs him will

protect him from liability as long as the employment lasts, we submit that such an argument cannot stand up under close scrutiny for the non-carrer oriented prosecutor because in his eyes a claim that he violated a defendant's civil rights might occur five, ten or twenty years after he leaves the office of the prosecutor. While such a non-career prosecutor wants and obtains trial experience, we submit he will not want to lay the groundwork for a civil suit in the future and will be most cautious in his approach to processing cases. It is common knowledge that the prosecutor who turns to private practice does so because of supposed greener pastures. Indeed, the private practioner normally earns substantially more than the career civil servant and thus could expect to lose more if he loses in a civil rights action.

Approximately 14 years have elapsed since petitioner Imbler was charged with murder. Deputy District Attorney Richard Pachtman must now, if he is not immune from civil suit, come forward and defend some of the actions he took so long ago. The instant case was

one of great gravity since it involved a death penalty, but Richard Pachtman has processed innumerable cases since that time. Every prosecutor who has been at his job for as many years as Richard Pachtman has been at his job will have tried so many cases that to some extent the facts of the cases and the unreported portions of them, i.e., conversations with witnesses or facts relating to investigations, will merge, one upon the other.

Allowing the prosecuting attorney to be sued under the civil rights act for the intentional use of perjured testimony or for negligently allowing the use of perjured testimony is perhaps not the fact that will cause a prosecutor to be less than forceful and rigorous in his prosecution of criminals. We submit that a major problem which will affect prosecutors throughout the United States will be the possible loss of the civil rights action and the ultimate financial burden on the prosecutor and his family since the plaintiff in a civil rights action may sue the prosecutor for damages, both compensatory and punitive. (Donahue v. Staunton, 471 F.2d 475 [Cert.den. 410 U.S.

955], 482 [7th Cir. 1972]; Busista v. Weir, 340 F.2d 74, 87-88 [3rd Cir. 1965].)

2. Cost to governmental agencies.

Although the Office of the District Attorney of Los Angeles County employs more than 500 attorneys as deputies, we recognize that most prosecutorial offices in the United States are quite small. We can therefore see that if the deputies are tied up in civil litigation (answers, interrogatories, and the like), that time must come from somewhere. There is but so much working time in the day and logic indicates that if a prosecutor is being sued personally and must respond to a complaint or appear at a trial, he will probably delay the criminal cases assigned to him. Indeed, courts are normally open only during certain hours and, if the prosecutor is defending himself in one court, he cannot be a prosecutor in another court. One method to avoid the foregoing problems may be to hire more prosecutors, but that may not be economically feasible in the vast majority of small counties throughout the United States.

It is therefore clear that

defending civil rights actions to completion of the lawsuit may well require local government to incur the cost of attorneys fees to represent the alleged errant prosecutor in addition to the cost of employing additional prosecutors and secretarial help. Another cost to local government may be that of liability insurance if local government will protect their prosecutors. The taxpayer may have deep pockets but all good things must come to an end and if funds are lacking, the judicial system and all members of the public will also be lacking.

Perhaps the most important cost to government may be called the inhibiting effect on the judicial system. It cannot be measured in dollars and cents but it is, by far, the most costly because all of society suffers if vigorous prosecutions do not occur.

The need for hard-hitting, vigorous prosecutors, especially in the delicate areas of organized crime, anti-trust litigation, prosecutions against well-known public figures and any other sensitive area, should not cause a prosecutor to shy away from the legal battle because ultimately some fact finder, perhaps far in the future, might conclude that he

overstepped his bounds. Moreover, it is quite possible that cases which could cause prosecutors the most trouble in the area of civil suit litigation might be those of little publicity significance.

In the scheme of prosecutorial duties it is the average case, the case which did not receive much publicity, the case that may have taken but one or two days to complete the trial, which may ultimately be the subject of a civil rights suit against a prosecutor. How can a prosecutor protect himself from the shadow of a future lawsuit? It would seem that a prosecutor may have to keep an accurate diary of each of his cases to such a degree that he can readily refresh his recollection years later. This type of pressure can only have a debilitating effect on the morale of prosecutors and would certainly lessen the possibility that industrious and courageous young men and women would become career prosecutors.

Once again the judicial process would ultimately pay the cost since the lack of capable and vigorous career prosecutors can only impair the functioning of that process.

II

PROSECUTORIAL IMMUNITY IS DERIVED FROM THE IMMUNITY ACCORDED THE JUDICIAL PROCESS[26]

In order to properly examine and understand prosecutorial immunity we must find its origin.

In Yaselli v. Goff, supra, 12 F.2d 396 (2d Cir. 1926) the court traced the origin of immunity for the judicial process and found that immunity from civil suit was necessary for the proper independent function of judges (at pp. 399-402), "attorneys in the presentation of the client's case to the court or the jury" (at p 402), grand jurors (at p. 403), petit jurors (at p. 403), public officers in general (at pp. 403-404),

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26. Petitioner has not attempted in his brief to analyze the origin and meaning of judicial immunity and its relationship to prosecutorial immunity. He merely claims that the "quasi-judicial" immunity afforded prosecutors means that prosecutors seek to "occupy that exalted role assumed by judges" and that prosecutors because they are members of the executive branch of the government cannot be the beneficiaries of judicial immunity. (Brief for Petitioner, p. 53.) As we shall demonstrate herein, petitioner has misconceived the nature of prosecutorial immunity which is derived not from the judiciary, but from the judicial process.

the United States attorney (at p. 404), and a prosecuting attorney (at p. 404). Concerning the prosecuting attorney the court in Yaselli quoted from Watts v. Gerking, 111 Or. 641, 222 P. 318, 228 P. 135, where the court originally found the prosecutor liable civilly for maliciously commencing a prosecution but on rehearing reversed itself and stated in part:

> ". . . we are confronted with a determination that concerns public policy. We are face to face with a law-enforcing problem. Criminal law does not enforce itself. It demands the assistance of valid evidence and fearless officials to put it in execution" (12 F.2d at p. 405). (Emphasis added.)

In Haldane v. Chagnon, 345 F.2d 601, 603-604 (9th Cir. 1965) the history of judicial process immunity was also traced and the court found it "firmly and deeply planted in the field of Anglo American law." The Haldane court stated:

> "The principle is demanded by every reasonable consideration of public policy and has long endured. In Yates v. Lansing, 1810, 5 Johns, N.Y. 282, Chief Justice Kent, tracing the doctrine

> and finding that its origin could be seen at least as early as the time of Edward III, had this to say, 'It is to be found in the earliest judicial records, and it has been steadily maintained by an undisturbed currert of decisions in the English courts, amidst every change of policy, and through every revolution of their government. A short view of the cases will teach us to admire the wisdom of our forefathers, and to revere a principle on which rests the independence of the administration of justice.' The Congress has not said that in civil rights cases there may be intrusion upon the rule, and again quoting the learned Chief Justice Kent, 'Ought such a sacred principle of the common law, as the one we have been considering, to be subverted, without an express declaration to that effect?'
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> "The Supreme Court of the United States has never retreated from early recognition of the compelling need of the doctrine. It held, in Bradley v. Fisher, 1871, 13 Wall. 335, 20 L.Ed. 646, that the principle of judicial immunity could not be undermined even

> by allegations that a judge's actions were motivated by corruption, malice, or other improper considerations. It said 'If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, * * * his office [would] be degraded and his usefulness destroyed, * * * '" (Haldane v. Chagnon, supra, pp. 603-604.)

We therefore submit that since Congress did not attempt to change the concept of immunity for the judicial process, that immunity so long established at the common law still exists.

The public is the beneficiary of immunity for the judicial process, not an individual judge, be he corrupt or not. (Pierson v. Ray, 386 U.S. 547, 554; 87 S.Ct. 1213, 1217-1218; 18 L.Ed.2d 288, 294 [1967].) That the test for immunity does not lie with judges alone but with the judicial process is also made clear in Donovan v. Reinbold, 433 F.2d 738, 743 (9th Cir. 1970). Certainly the trial setting in the case sub judice places the prosecutor in the performance of an act within the scope of his duties. (See Marlowe v. Coakley, 404 F.2d 70, 71 [9th Cir. 1968].)

Since prosecutorial immunity is derivative from immunity for the judicial process and since the purpose of immunity for the judicial process is to benefit the public (see Pierson v. Ray, supra) it follows that the purpose of prosecutorial immunity is to benefit the public, i.e., the judicial system as a whole.

In the effort to insulate the judicial process from outside influences it has long been recognized that the judge is not the only actor to be protected. Others share certain functions whthin the judicial process and those acts have been considered quasi-judicial acts. The quasi-judicial acts are an integral part of our judicial process and must be protected from outside influence just as judicial acts must be protected. (Bauers v. Heisel, 361 F.2d 581, 589-590 [3rd Cir. 1966], cert. denied, 386 U.S. 1021, 87 S.Ct. 1367, 18 L.Ed.2d 457 [1967].) One of the main actors on the stage of the criminal judicial process is the prosecuting attorney. The prosecutor has been given quasi-judicial immunity derivative from immunity for the judicial process. (Bauers v. Heisel, supra.) Indeed, even defense attorneys have been accorded such immunity. (Jones v. Warlick, 364 F.2d 828 [4th Cir.

1966].)[27]

An important distinction to be made in deciding whether immunity from civil suit should be granted a prosecutor is the determination of what is a judicial or non-judicial act. The dissent in the court below argues that, regardless of whether the act of the prosecutor is part of the judicial process, the prosecutor should not be able to hide behind such a label if his motivation in doing the act was improper. (Imbler v. Pachtman, 500 F.2d 1301, 1305-1306 [dissent], 9th Cir. 1974.) The majority in Imbler, supra, states that one should only examine the act itself, i.e., whether or not the act is within or without the judicial process, and not examine the prosecutor's motive. (See Tyler v. Witkowski, 511 F.2d 449 [7th Cir. 1974].) The view of the Imbler majority

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27. We recognize that one reason a defense attorney who is not employed by a governmental agency may have immunity is because he does not operate under color of law. However, we submit that another reason is that such immunity is derived from the judicial process and thus even those defense counsel who are employed by a governmental entity are immune. (French v. Corrigan, 432 F.2d 1211, 1214-1215 [7th Cir. 1970].)

is that, if motivation is the distinquishing factor, the purpose of judicial immunity would be undermined. Indeed, if motivation is considered, in reality that would be putting the proverbial cart before the horse since the issue of motivation does not arise if examination of the act makes the actor immune. If it is proper to consider motivation of the prosecutor, then the motivation of the judiciary is also subject to scrutiny since both the prosecutor and the judiciary are immune because of their role in the judicial process. Thus motivations of members of the judiciary would become subject to scrutiny contrary to the holding of this Court in Bradley v. Fisher, 13 Wall 335, 80 S.Ct. 335, 20 L.Ed. 646 (1872). There should be no doubt but that the presentation of a case before a court is part of the judicial process and thus, if a prosecutor must weigh his every word and act in the course of trial, the judicial process will be harmed immeasurably. It is only common sense that a civil suit, with or without merit, will inhibit the action of the person sued. A trier of fact may find liability many years after the event and perhaps only because the prosecutor could not marshal enough evidence so long after the fact.

Furthermore, in examining the Imbler dissenting opinion we submit it supports the majority opinion for at 500 F.2d 1306 the dissent states:

> "Not to be forgotten is the high responsibility accepted by a prosecuting officer when he enters upon the duties of his office. For example: (1) he is required to recognize that in our system of justice, the accused is to be given the benefit of all reasonable doubt; (2) his decisions during the course of the prosecution must be fair to all, including the defendant; (3) he has a duty of timely disclosure to the defense of all available evidence known to him that tends to help the defendant, and (4) it is his duty to seek justice, not pervert it by placing a conviction above the constitutional rights of the accused."

Of the four duties of the prosecutor as set forth above by the dissent, numbers (1), (2), and (4) are also duties of judges. Thus, if those duties do not require prosecutorial immunity, then the next step would be to destroy judicial immunity for they both play

a similar role[28] in the judicial process. It is this process from which both derive their immunity because of the necessity for the process of adjudication to be independently free from extraneous outside influence.

Both judges and prosecutors seek justice so that one form of the judicial system may survive. Judges, as well as prosecutors, are held to a high standard of conduct (Cannon 1, ABA Cannons of Judicial Ethics; Cannon 1, California Cannons of Judicial Ethics) but the judges' immunity would protect them from, for example as in the case sub judice, knowingly allowing a defendant to be convicted upon perjured testimony. Referring to judicial immunity in Pierson v. Ray, this Court

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28. "A prosecutor is called upon to determine, upon evidence submitted to him, whether a criminal offense has been committed by the person accused--exactly the same question that is presented to a court or jury upon trial. His decision is no less judicial in character if it be erroneous or swayed by prejudice or malice. It does not matter whether the evidence before him be much or little or whether he hears all or only some of it. His authority to investigate the facts before acting is unlimited and the matter rests in his own discretion. He is a quasi-judicial officer and he is also an executive officer." Pearson v. Reed, supra, 44 P.2d 592, 6 Cal.App.2d 277 (1935).

stated:

> "This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' (Scott v. Stansfield, L.R. 3 Ex. 220, 223 (1868), quoted in Bradley v. Fisher, supra, 349, note, at 350.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." (386 U.S. 554, 87 S.Ct. 12-18, 18 L.Ed.2d 294-295.)

Since both judges and prosecutors are part of the judicial process, they both must be

accorded immunity for the same acts.

CONCLUSION

For our system of justice to survive those intimately connected to the judicial process must be immune from the intimidating effect of civil suit for actions taken in the course of their official duties. This concept has been recognized for centuries and for the reasons set forth above should not be cast away.

Respectfully submitted,

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